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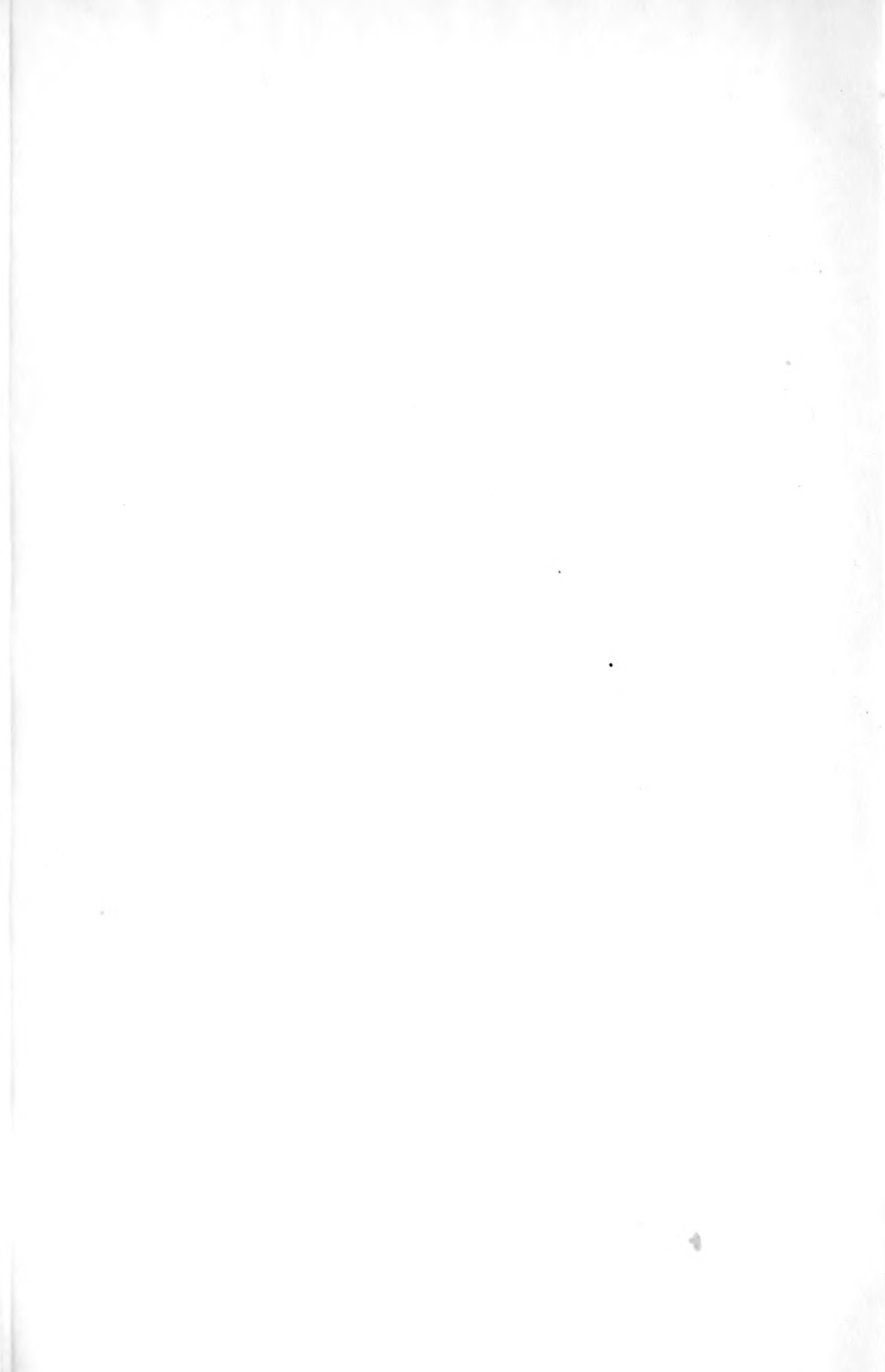
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PRACTICE
SPECIAL ACTIONS

IN THE
COURTS OF RECORD

OF THE
STATE OF NEW YORK,

UNDER THE
CODE OF CIVIL PROCEDURE AND STATUTES, WITH FORMS.

BY
J. NEWTON FIERO,
DEAN OF THE ALBANY LAW SCHOOL.

IN TWO VOLUMES.

VOL. II.

SECOND EDITION.

ALBANY, N. Y.:
MATTHEW BENDER PUBLISHER.
1897.

Entered according to act of Congress, in the year one thousand eight hundred and eighty-eight,

By MATTHEW BENDER,

In the office of the Librarian of Congress, at Washington.

Entered according to act of Congress, in the year one thousand eight hundred and ninety-seven,

By MATTHEW BENDER,

In the office of the Librarian of Congress, at Washington.

WEED-PARSONS PRINTING COMPANY,
PRINTERS AND ELECTROTYPERS,
ALBANY, N. Y.

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ARTICLE I.

NATURE OF THE ACTION.

Replevin was among the earliest remedies given by the common law, and its origin antedates its written history by an unknown period. Replevin is a remedy for any unlawful taking and detention, or detention alone of personalty, the same being delivered to the claimant upon security given either to make out

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the injustice of the detention or to return the property. Amer. Ency. of Law, vol. 20, page 1041, citing Cobbe's Law of Replevin and Morris on Replevin. The definition that replevin is a writ for an unjust taking and detention of goods or chattels commanding the sheriff to deliver back the same to the owner, upon security given, to make out the injustice of the detention, or else to return the goods and chattels. A definition of replevin is given in Bouv. Law Dictionary "a form of action which lies to regain possession of personal chattels which have been taken from the plaintiff unlawfully."

The action of replevin was abolished by the Code of Procedure, and its peculiar and distinctive features superseded by the rules of practice therein provided for the conduct of actions of claim and delivery. Analogies drawn from the characteristics of the former action of replevin are not sufficient to overthrow or vary the clear and explicit language of the Code. *Newell Universal Mill Co. v. Muxlow*, 115 N. Y. 174, opinion Ruger, Ch. J., citing *Kilburn v. Lowe*, 37 Hun, 237, and overruling *Ackerman v. De Lude*, 36 Hun, 44.

It is an action for the recovery of specific personal chattels wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned, and may be brought whenever one person claims chattels in the possession of another, whether his property in the goods is absolute or qualified, provided he had the right of possession at the time the suit was begun. It is a mixed action, being both specific for the article, and for damages. Wells on Replevin, 21, etc. : *Clark v. Skinner*, 20 Johns. 467 ; *Rogers v. Arnold*, 12 Wend. 30 ; *Yates v. Fassett*, 5 Den. 21 ; *Sharp v. Whittenhall*, 3 Hill, 576. The old action of replevin and its modern substitute are alike in the nature of proceedings *in rem*. *First Nat. Bank v. Dunn*, 97 N. Y. 149.

It is a right of possession rather than a right of property that is to be tried in replevin, and in order to maintain the action plaintiff must show the right of possession in himself as against the defendant, and the burden of proof for this purpose is upon the plaintiff. *Dodsworth v. Jones*, 4 Duer, 201 ; *McCurdy v. Brown*, 1 Duer, 101 ; *Redman v. Hendricks*, 1 Sandf. 32 ; *Rogers v. Arnold*, 12 Wend. 30 ; *Rockwell v. Saunders*, 19 Barb. 473.

Under the statutes and decisions the well settled rule is, that

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the action lies for any wrongful taking or unlawful detention of the goods of another. *Pangburn v. Partridge*, 7 Johns. 140; *Wheeler v. McFarland*, 10 Wend. 318; *Gardner v. Campbell*, 15 Johns. 401; *Hopkins v. Hopkins*, 10 Johns. 369. It belongs to the same class of cases as trespass and trover. *Marshall v. Davis*, 1 Wend. 109; *Holbrook v. Wight*, 24 Wend. 169. But replevin is a possessory action unlike either. *Burdick v. McVanner*, 2 Den. 171. This distinction between the actions is pointed out in *Ely v. Ehl*, 3 N. Y. 506; *Allen v. Fox*, 51 N. Y. 562. Replevin in the *cepit* is for the wrongful taking of the goods; replevin in the *detinet* is for the wrongful detention. *Cummings v. Vorce*, 3 Hill, 282; *Pierce v. Van Dyke*, 6 Hill, 613.

In order to maintain an action the defendant must have had some title in or control over the right to the possession of the property at the commencement of the action. *Rogers v. Arnold*, 12 Wend. 30; *King v. Orser*, 4 Duer, 431. Or must have wrongfully parted with the possession; *Brockway v. Burnap*, 16 Barb. 309; *Nichols v. Michael*, 23 N. Y. 264; *Ellis v. Lersner*, 48 Barb. 539; and subject to these rules any person wrongfully in possession of property is a proper defendant at the suit of a person having the right to immediate possession. *Corn Exch. Bank v. Blye*, 101 N. Y. 303.

The codifiers in their note to this chapter state that it was found necessary to make several material changes in the statutes in order to codify the entire law relating to the subject, as under the old Code it was partially regulated by the then unrepealed Revised Statutes as well as by the Code; they state that they have materially modified the provisions of the Code, but not so as to disturb the general plan, and that they have introduced many new provisions to fill gaps or settle disputed questions. It should be noted that, as reported by the codifiers, the chapter contained a section in place of the present opening section, which was contained in the Revised Statutes, prescribing in general terms when an action of replevin can be maintained; this seems to have been stricken out by the Legislature, and the section of the Revised Statutes repealed, so that there exists the anomalous and unscientific statement, of cases in which the action cannot be maintained, as the only apparent authority for the action to which nearly fifty subsequent sections are devoted. In *Manning v. Kewan*, 73 N. Y. 45, Chief Judge Folger reviews the

ART. I. Nature of the Action.

history of the writ of replevin at common law and under our statute. It was held under the former Code in *Porter v. Willett*, 14 Abb. 319, that the action of replevin in all respects, except its form and the additional provisional remedy provided by that Code, remained where it was left by the Revised Statutes, and the rights arising incidentally under it must be regarded as unrepealed by such Code. The deficiencies arising in the practice under the Code and Revised Statutes are pointed out in *Corbin v. Milton*, 27 How. 76; *Vogel v. Badcock*, 1 Abb. 176; *Wilson v. Wheeler*, 6 How. 49. But it was held that the remedy under the Code was applicable whenever replevin would theretofore lie. *Ross v. Cassidy*, 27 How. 416; *Brockway v. Burnap*, 16 Barb. 309; *Nichols v. Michael*, 23 N. Y. 264. It was a provisional remedy under the old Code, but as it is used in only one species of action is not so considered in the present Code.

An action to recover a chattel as regulated by the Code of Civil Procedure is substantially a substitute for an action of replevin as it previously existed. *Griffin v. L. I. R. R. Co.* 101 N. Y. 352. Where plaintiffs claim to be the absolute owners of bonds unaffected by any right which the defendant might assert in respect to them, they were bound to show, in order to maintain the action, that no title had passed to the defendant, or that at some time prior to the commencement of the action they, the plaintiffs, had become entitled to the possession of such bonds or some part thereof. *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 332, citing *Duncan v. Brennan*, 83 N. Y. 487; *Clemens v. Yturria*, 81 N. Y. 285.

It seems that replevin for the unlawful taking lies only where trespass might be brought and does not lie by an owner of real property to recover bark cut therefrom by defendant unless the plaintiff was in possession or the lands were unoccupied. *Shattuck v. Bascom*, 55 Hun, 14; S. C. 9 Supp. 934, 28 St. Rep. 333.

The owner of lands, however, has such constructive possession as will authorize him, in the absence of an adverse possession, to maintain replevin for logs cut thereon. *Weeks v. Martin*, 10 Supp. 656; S. C. 32 St. Rep. 811. Where plaintiff was in possession of chattels under a fraudulent chattel mortgage he was held to be entitled to maintain the action against a sheriff who had seized them on execution against the mortgagor, where it appeared the mortgagor had made a general assignment. In such

 Art. 2. The Action, When it Lies, By and Against Whom.

case possession is sufficient to maintain the action against one who can show no better title. *Guilford v. Mills*, 57 Hun, 493. See, in connection with this case, § 1723 and cases there cited.

Where property in which two persons have an interest, one as the owner, the other a special property, either can maintain an action and recover the full value of the property, and the recovery by one bars the recovery by the other. *Baxter v. Wesley*, 24 St. Rep. 57. Plaintiff may maintain replevin where he had delivered a promissory note to defendant as collateral security and defendant had again pledged it for his own indebtedness a transfer of the note and inability to deliver it on demand is conversion by defendant. *Ertell v. De Pennevet*, 14 Civ. Pro. R. 336. So where a party holds tickets for another which he refuses to deliver on demand, the owner may maintain replevin. *Nat. Steam Ship Co. v. Sheahan*, 13 St. Rep. 429.

ARTICLE II.

THE ACTION, WHEN IT LIES, BY AND AGAINST WHOM.

§§ 1692, 1690, 1691.

SUB. I. TITLE MUST BE IN PLAINTIFF.

2. WHEN AND FOR WHAT ARTICLES REPLEVIN LIES. § 1692.
3. WHEN THE ACTION CANNOT BE MAINTAINED. §§ 1690, 1691.
4. AGAINST WHOM THE ACTION CAN BE MAINTAINED.
5. WHEN DEMAND OR TENDER NECESSARY.
6. ELECTION OF REMEDIES.

SUB. I. TITLE MUST BE IN PLAINTIFF.

The plaintiff must have a general or specific property in the goods with the right to their possession at time of suit brought. *Thompson v. Button*, 14 Johns. 84; *Pattison v. Adams*, 7 Hill. 126; *Miller v. Adsit*, 16 Wend. 335; *Packard v. Getman*, 4 Wend. 613; *Hallenbrake v. Fish*, 8 Wend. 547; *Sager v. Blain*, 44 N. Y. 445; *Dunham v. Wyckoff*, 3 Wend. 281; *Wheeler v. McFarland*, 10 Wend. 318; *Sharp v. Whittenhall*, 3 Hill, 576; *Redman v. Hendricks*, 1 Sandf. 32; *Johnson v. Carnley*, 10 N. Y. 570; *Wood v. Orser*, 25 N. Y. 348; *Easterly v. Nat. Exch. Bank*, 3 T. & C. 366; *Fulton v. Fulton*, 48 Barb. 581. Ownership is not necessarily determined in the action, but the right to the possession necessarily is. *Rogers v. Arnold*, 12 Wend. 30. Ownership without right of possession is not sufficient to maintain the action.

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Neff v. Thompson, 8 Barb. 213; *Pangburn v. Partridge*, 7 Johns. 140; *Hall v. Tuttle*, 2 Wend. 475; *Dubois v. Harcourt*, 20 Wend. 41; *Hotchkiss v. McVicker*, 12 Johns. 103; *Marshall v. Davis*, 1 Wend. 109. Prior rightful possession is *prima facie* proof of title, and as against all but the true owner entitles plaintiff to recover. *Cook v. Howard*, 13 Johns. 276; *Daniels v. Ball*, 11 Wend. 59; *Demick v. Chapman*, 11 Johns. 132; *Cresson v. Stout*, 17 Johns. 116; *Schmerhorn v. Van Valkenburgh*, 11 Johns. 529; *Morris v. Danielson*, 3 Hill, 168. Special property is the lawful custody of the property with the right of detention against the general owner. Wells on Replevin, § 121. As where one has possession of goods with a valid lien thereon against the owner; as a workman who repairs a carriage or watch, or who advances money on an article; *Everett v. Coffin*, 6 Wend. 603; *Moore v. Hitchcock*, 4 Wend. 292; *Curtis v. Jones*, 3 Den. 590; *Morgan v. Congdon*, 4 N. Y. 552; *Platt v. Hibbard*, 7 Cow. 497; *Bush v. Lyon*, 9 Cow. 52; *Holbrook v. Wight*, 24 Wend. 169; *Wood v. Orser*, 25 N. Y. 349; *Ingersoll v. Van Bokkelen*, 7 Cow. 670; *Baker v. Hoag*, 7 N. Y. 555; *Wheeler v. McFarland*, 10 Wend. 318; *Rogers v. Arnold*, 12 Wend. 30; or an officer who has levied on goods under an execution. *Lockwood v. Bull*, 1 Cow. 322; *Morris v. Van Voast*, 19 Wend. 283; *Dezell v. Odell*, 3 Hill, 215; *Yates v. St. John*, 12 Wend. 74; *Phillips v. Hall*, 8 Wend. 610; *Mitchell v. Hinman*, 8 Wend. 667; *Dunlap v. Hunting*, 2 Den. 643; *Miller v. Adsit*, 16 Wend. 335. But where a party claims a lien unaccompanied by the right of possession, he cannot maintain replevin to obtain possession of the property in order to enforce his lien. *Otis v. Sill*, 8 Barb. 102. But process alone gives an officer no title by which he can maintain replevin; it must be valid process. An officer, acting under process apparently valid but actually void, may avail himself thereof for defence but not for aggression. When, therefore, an officer, by virtue of process, valid upon its face but void for want of jurisdiction in the court issuing it, has levied upon and takes possession of property against another officer who, by virtue of process against the owner, apparently valid, has taken it from plaintiff's possession, the character of such possession is a subject of inquiry and attack, and the invalidity of the process under which plaintiff acted may be shown, but defendant's process protects him, and its validity cannot be assailed. Plaintiff's process, however, and

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his possession under it, establish *prima facie* a cause of action. *Clearwater v. Brill*, 63 N. Y. 627.

Proof that plaintiff delivered certain bonds to an agent for sale; that such agent placed those not sold in an envelope bearing an indorsement stating that they were the property of plaintiff, and upon making a general assignment delivered them in such envelope to the assignee among papers designated as trust property, coupled with an admission of plaintiff's previous purchase of them, is sufficient to identify the bonds as plaintiff's property and entitle him to possession as against such assignee. *Andrews v. Welling*, 84 Hun. 40, 32 Supp. 4, 65 St. Rep. 126. An action in the nature of replevin in the cepit can only be maintained where trespass would lie, and it is immaterial that defendant has parted with possession of the property. *Hoffman v. Markhan*, 88 Hun. 18, 68 St. Rep. 292, 34 Supp. 508.

Where furniture was leased to one defendant under a provision providing for payment of weekly sums, with an agreement that the leases should cease and plaintiff be entitled to possession if default were made in any of the payments and that the chattels should not be underlet without consent; a transfer was made to the other defendant without such consent, default in payment and demand on the transferee and refusal; it was held replevin would lie against both defendants even though the transferee had no knowledge of the lease. *Scofield v. Valentini*, 46 St. Rep. 880, 19 Supp. 225. To sustain an action of replevin, plaintiff must show a right to possession at the time suit was brought. *Eisler v. Nat. Transfer & Storage Co.* 35 St. Rep. 374, 12 Supp. 732, citing *Wood v. Orser*, 25 N. Y. 348; *Hudson v. Swan*, 83 N. Y. 552; *Duncan v. Brennan*, 83 N. Y. 487; *Thompson v. St. Nicholas Bank*, 113 N. Y. 325.

A written declaration by defendants that they held goods for which replevin was brought as agent for plaintiff, was held sufficient to sustain replevin. *La Societe Anonyme De'L Union Des Papeteries v. Marks*, 50 St. Rep. 497, 21 Supp. 706. In *Devlin v. Kosel*, 3 Misc. 40, 51 St. Rep. 130, 22 Supp. 361, it was held replevin would lie for articles bought by a defendant who obtained possession under an agreement to pay for them during the day but refused payment unless the amount of a mortgage on the articles assigned to him and which plaintiff claimed had been paid, was deducted from the purchase price.

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Where goods were delivered by plaintiff for examination under an option to purchase, and before the exercise of the option were attached as the property of the holder, *held*, plaintiff had a right to reduce them to possession at the time of the attachment and could maintain replevin against the sheriff. *Klee v. Grant*, 4 Misc. 88, 53 St. Rep. 77, 23 Supp. 855, reversing 2 Misc. 412, 51 St. Rep. 117, 21 Supp. 1010. Where it was shown that plaintiff's assignor and another had before the replevin suit, obtained an injunction against defendant disposing of the property in question which was in force when plaintiff made his demand, it was held there was no unlawful detention and the original taking having been lawful replevin would not lie. *Sherman v. Jenkins*, 70 Hun, 593, 53 St. Rep. 780, 24 Supp. 186.

The owner of lands has such constructive possession as will authorize him in the absence of an adverse possession, to maintain replevin for logs cut thereon. *Weeks v. Martin*, 32 St. Rep. 811, 10 Supp. 656, citing *Johnson v. Elkwood*, 53 N. Y. 431. But it seems that replevin in the *cepit* only lies where trespass might have been brought, and not in an action by an owner of real property to recover bark cut therefrom by defendant unless the plaintiff was in possession or the lands were unoccupied. *Shattuck v. Bascom*, 55 Hun, 14, 28 St. Rep. 333, 9 Supp. 934, citing *Rich v. Baker*, 3 Den. 79; *Stockwell v. Phelps*, 34 N. Y. 363.

Plaintiff being in possession of chattels under a fraudulent chattel mortgage was held entitled to maintain replevin against a sheriff who had seized them on execution against the mortgagor, where it appeared that before the seizure the mortgagor had made a general assignment for the benefit of creditors. Possession is sufficient to maintain such an action against one who can show no better title. One who takes property from the possession of another cannot defend his act on the ground that the property belongs to a third person unless he acts by such third person's authority. *Guilford v. Mills*, 57 Hun, 493, citing *Wheeler v. Lawson*, 103 N. Y. 40; *Loos v. Wilkinson*, 110 N. Y. 195. A purchaser of goods at a chattel mortgage sale becomes the owner and entitled to immediate possession of the goods when they are struck down to him and his deposit is accepted, and he may maintain replevin against one who wrongfully interferes with him. *Williamson v. Lawrence*, 8 Misc. 71, 58 St. Rep. 834, 28 Supp. 594. Actual possession of personal property un-

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der a conditional bill of sale, by the terms of which the title is to pass when the property paid for is sufficient to enable the purchaser to maintain an action of replevin against a party taking the property from his possession. *Appleby v. Hollands*, 8 App. Div. 375.

A foreign stock corporation may maintain an action of replevin; it is not prevented from so doing by § 15, chapter 687, Laws of 1892. *American Type Founders' Co. v. Conner*, 6 Misc. 391, 56 St. Rep. 398, 26 Supp. 742. In the absence of explanation, the fact that goods were sold on credit on the representation, among others, that the vendee owed no one but the vendor, and that three days later he confessed judgment to two persons not disclosed to the vendor, entitles the latter to rescind the sale and maintain an action to recover possession of the goods. *Schwabeland v. Buchler*, 8 Misc. 86, 58 St. Rep. 831, 28 Supp. 523.

Where goods obtained by fraud have been levied upon by virtue of an attachment against the vendee before any act of rescission on the part of the vendor, the latter upon rescinding cannot maintain replevin for the goods but is remitted to an action for conversion. *Wise v. Grant*, 140 N. Y. 593, 35 N. E. Rep. 1078, 56 St. Rep. 496. The amendment of 1894 to § 1690 of the Code was not retroactive and did not affect cases pending at the time of its passage. *National Park Bank v. Goddard*, 9 Misc. 626, 30 Supp. 417, 62 St. Rep. 207.

The intent of subdivision 3 of § 1690 was to exempt from the prohibition of that section cases of constructive as distinguished from actual possession, and to give the remedy to the true owner where the possession by the attachment or execution was without right or a mere custody for the true owner, the legal possession being in him at the time of the seizure, through his agent, servant or naked bailee. The words "right to reduce" to possession were intended to cover a case where the possession of the plaintiff was constructive and not actual, and they do not cover a case where the right to reduce to possession was potential only, and which required for its existence the doing of some act which would terminate a legal possession in another as owner, and transfer the right of possession to the plaintiff. *Wise v. Grant*, 140 N. Y. 593, 56 St. Rep. 496.

Where plaintiff brought replevin against the county clerk for certificates of deposit payable to him and not indorsed and his

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proceedings were stayed until the representatives of a decedent to whose estate it was claimed they belonged, were brought in as defendants, it appearing that the certificates had been given to the clerk by order of the court in an action brought by plaintiff to recover the amount of the certificates from the bank which issued them, which alleged that they were in the possession of one who retained them as the property of his deceased wife, who brought them into court under a subpoena; *held*, that it must be assumed that plaintiff was the owner, that claiming by paramount title he could have replevin for possession of the certificates, and that the order for their retention by the clerk was unauthorized. *Read v. Brayton*, 143 N. Y. 342, citing *Corn Exchange Bank v. Blye*, 101 N. Y. 303.

The court has no authority to impound securities produced under a subpoena by one not a party to the action, and where it does so an action of replevin may be maintained by the true owner against the clerk to recover possession of such security. *Read v. Brayton*, 143 N. Y. 342, 38 N. E. Rep. 261, 62 St. Rep. 333. Where goods are sold for cash and the vendee after obtaining possession refuses to pay for a portion of them, the vendor may maintain replevin for such portion. *Thompson v. McLean*, 10 Supp. 411.

Where property is sold under a contract giving the vendor the right to take possession at any time before the date fixed for payment if he deems himself insecure, is seized under an execution against the vendee, the vendor may maintain an action to recover its possession. *Payne v. Batterman*, 22 Week. Dig. 109. A reversal of a judgment in an action in which an attachment has been issued annuls the title of the purchaser on execution and entitles the owner to receive it back. The owner of property sold on execution against one who had merely a personal license to use it, but no title as lessee or otherwise, can maintain an action to recover against any one into whose possession it comes. *Reinmiller v. Skidmore*, 7 Lans. 161. The plaintiff, in order to maintain replevin, must show that he was entitled to possession at the time of the commencement of the action. *Wheeler v. Vanderwee*, 88 Hun, 233, 34 Supp. 799, 68 St. Rep. 721. If an insolvent purchases goods, concealing his insolvency and intending not to pay for them, the property does not pass and the vendor may reclaim them. *Thomas v. Snyder*, 77 Hun, 365.

 Art. 2. The Action, When it Lies, By and Against Whom.

When, in an action of replevin for the possession of several chattels, the defendant, in his answer, claims absolute title to some of the chattels and demands judgment therefor, and serves an offer of judgment in favor of the plaintiff for all the chattels in suit except those claimed in the answer, and the offer is accepted and judgment entered accordingly, the title of the defendant to the chattels claimed in his answer and excepted from his offer is exclusively established, and the plaintiff is estopped from asserting title thereto in another action of replevin subsequently brought against him by the original defendant to recover possession of such excepted chattels, if retained by the original plaintiff under his preliminary requisition in the original action, *Shepherd v. Moodie*, 150 N. Y. 183, reversing 8 Misc. 607.

SUB. 2. WHEN AND FOR WHAT ARTICLES REPLEVIN LIES. § 1692.

 § 1692. *Id.*; by an assignee.

An action to recover a chattel, the title to which has been transferred to the plaintiff, since the wrongful taking, or during the wrongful detention thereof, with or without the damages sustained by the taking, withholding, or detention, may be maintained in any case, where, except for the transfer, such an action might be maintained, by the person from or through whom the plaintiff derives title; but not otherwise.

A surety on an undertaking was allowed to prosecute the action where the principals had failed in business and allowed a default. *Hoffman v. Steinau*, 34 Hun, 239. The wife who has left her husband without good cause and is living apart from him, may maintain replevin against him to recover articles of personal property belonging to her which remained in his house and possession. *Howland v. Howland*, 20 Hun, 472. Defendant by deceit and misrepresentation obtained possession of his horse from plaintiff, a livery stable keeper, having a right to acquire a lien thereon for his keep, *held*, that plaintiff could maintain an action to recover possession of the horse. *Kline v. Green*, 5 Misc. 100.

A purchaser of goods at a sale on foreclosure of a chattel mortgage becomes the owner thereof when they are struck down to him and his deposit is accepted, and is entitled to immediate possession and may maintain replevin against persons wrongfully interfering therewith. *Williamson v. Lawrence*, 8 Misc. 71. A purchaser of personal property who gives a note therefor providing that the goods shall remain the property of the vendor until fully paid for, which note is duly filed, has no leviable interest in

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the goods; the vendor may demand possession at any time, and in case of a levy under an execution against the vendee may maintain replevin to recover the property. *Burchell v. Green*, 6 Misc. 236.

Replevin may be maintained for goods obtained from plaintiff by false representations by a purchaser against auctioneer's having possession of the goods for the purpose of sale from a subsequent purchaser with notice. *Grossman v. Walters*, 11 Supp. 471. Where goods of one in the possession of another are taken on attachment, the right of the owner to the possession of the goods is such a right to reduce into possession under § 1690 of the Code as will sustain replevin against the sheriff. *Klee v. Grant*, 53 St. Rep. 77, on reargument reversing judgment which was affirmed in 51 St. Rep. 117.

Property upon which a levy has been made by an officer when found in, and taken from, the possession of the defendant in the execution cannot be replevied unless in a case where the taking was tortious, and the officer liable in trespass. *First Nat. Bank v. Dunn*, 97 N. Y. 157. Actual possession by plaintiff coupled with an equitable interest is sufficient to enable him to maintain the action and entitle him to a return of the property, though the general property and right of immediate possession is in a stranger, defendant showing no privity between himself and such stranger. *Johnson v. Carnley*, 10 N. Y. 570; *Frost v. Mott*, 34 N. Y. 253. And property in a stranger is not available as a defence unless defendant connects his title with that of the stranger. *Duncan v. Spear*, 11 Wend. 54; *Rogers v. Arnold*, 12 Wend. 30; *Hoyt v. Van Alstyne*, 15 Barb. 568; *Gerber v. Monie*, 56 Barb. 652; *Davis v. Hoppock*, 6 Duer, 254; *King v. Orser*, 4 Duer, 431. Replevin will lie by a vendor against a vendee who has purchased goods conditionally and failed to fulfill the conditions of the sale, or where a vendee obtained possession of goods with intent to defraud. *Russell v. Minor*, 22 Wend. 659; *Leven v. Smith*, 1 Den. 571; *Smith v. Lynes*, 5 N. Y. 41; *Hall v. Naylor*, 18 N. Y. 588; *Nichols v. Michael*, 23 N. Y. 264; *Morris v. Rexford*, 18 N. Y. 552; *Wilson v. Nason*, 4 Bosw. 155; *Hunter v. H. R. etc. Co.* 20 Barb. 493. Where goods are bought by sample, and on receipt the defendant refused to pay for them on the ground that they were not like the sample, and refused to return the goods, *held*, replevin would lie. *Osborn v. Gantz*, 60 N. Y. 540.

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Where goods are obtained by fraud the owner can sustain replevin against the fraudulent purchaser so long as the goods are in possession of such purchaser. *Cary v. Hotaling*, 1 Hill, 311; *Van Cleef v. Fleet*, 15 Johns. 149; *Lloyd v. Brewster*, 4 Paige, 537; *Acker v. Campbell*, 23 Wend. 372; *Malcolm v. Loveridge*, 13 Barb. 372; *Andrews v. Diettrich*, 14 Wend. 32; *Delin v. Stohl*, 2 Civ. Pro. R. 222; *Keyser v. Harbeck*, 3 Duer, 373; *Allison v. Matthieu*, 3 Johns. 235; *Ash v. Putnam*, 1 Hill, 302; *McKnight v. Morgan*, 2 Barb. 171; *Nichols v. Pinner*, 18 N. Y. 295. See latter case as to rights of an innocent purchaser. The rule is that a seller of merchandise, having no title, can convey none. *Williams v. Merle*, 11 Wend. 80; *Ash v. Putnam*, 1 Hill, 302; *Ross v. Cassidy*, 27 How. 416; *Spaulding v. Brewster*, 50 Barb. 142; *Ely v. Ehle*, 3 N. Y. 506; *Linnen v. Cruger*, 40 Barb. 633; *Brower v. Peabody*, 13 N. Y. 121; *Saltus v. Everett*, 20 Wend. 267; *Nash v. Mosher*, 19 Wend. 433; *Cobb v. Dows*, 10 N. Y. 335. A general assignee is not an innocent purchaser; *Barrett v. Warner*, 3 Hill, 350; nor one who takes goods in payment of a pre-existing debt. *Coddington v. Bay*, 20 Johns. 637; *Durell v. Haley*, 1 Paige, 492; *Adams v. Smith*, 5 Cow. 280.

The rule is, however, laid down in *Stevens v. Brennan*, 79 N. Y. 254, as follows: Where a sale of goods has been induced by fraud on the part of the vendee, the vendor may reclaim and take them from the possession of any one except from a transferee in good faith and for a valuable consideration paid at the time of the transfer. A transfer, by the fraudulent purchaser, as security for or in payment of a fraudulent debt does not make the transferee a *bona fide* purchaser, within the rule, so as to hold the goods against the vendor. In a suit by such vendor to recover the goods from one claiming title under the fraudulent vendee, the burden is upon the latter of showing that he is a purchaser in good faith and for value, citing the rule that there must be a fresh consideration at time of transfer. *Root v. French*, 13 Wend. 570; *Weaver v. Barden*, 49 N. Y. 286. In *Parker v. Conner*, 93 N. Y. 118, it is held that in order to render a sale, for a valuable consideration of personal property paid at the time of sale and taken into the actual possession of the vendee, invalid as against the creditors of the vendor, it is necessary to show that the vendee had actual knowledge or belief, or at least, actual suspicion that the sale was being made with intent,

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on the part of the vendor, to defraud his creditors. This case and 79 N. Y. 254, *supra*, are cited and followed in *Mather v. Freelove*, 3 St. Rep. 424. In *Davis Sewing Machine Co. v. Best*, 105 N. Y. 59, it was held that a party purchasing commercial paper, which in some particulars remains incomplete and imperfect, does not acquire the character of a *bona fide* holder, and, it seems, cannot maintain replevin therefor; that replevin cannot be maintained for paid check. *Barnett v. Selling*, 70 N. Y. 492.

A mortgagee of chattels, entitled to possession by reason of failure to pay installments when due, can maintain the action against a sheriff, who seizes the same, by virtue of an attachment against such mortgagor after such default. *Willis v. O'Brien*, 45 Supr. Ct. 536. A party having title to lands on which is growing timber and bark, and not being in actual possession, may maintain replevin against one in possession, under a void deed, who cuts and carries away such timber and bark. *Youmans v. Francisco*, 15 Week. Dig. 312. Replevin lies for the specific chattels which have been severed from the realty by the wrongdoer, but the claimant must be an actual owner, or in actual or constructive possession, of the land, and constructive possession can only be based on a valid title. *Johnson v. Elwood*, 53 N. Y. 431. The owner of land may maintain replevin for fixtures wrongfully removed. *Laflin v. Griffiths*, 35 Barb. 58.

Where goods have been feloniously taken, the owner may recover them in the hands of an innocent party, and this whether the taker has been convicted or not. *Hoffman v. Carow*, 20 Wend. 21; S. C. 22 Wend. 285; *Florence Sewing Machine Co. v. Warford*, 1 Sweeney, 433; *Gordon v. Hostetter*, 37 N. Y. 99. One tenant in common of personal property cannot maintain replevin against the other to acquire its possession. *Russell v. Allen*, 13 N. Y. 173; *Wilson v. Reed*, 3 Johns. 177; *Rogers v. Arnold*, 12 Wend. 30; *Walker v. Spring*, 5 Hun, 107; *Davis v. Lottich*, 46 N. Y. 393; *Hudson v. Swan*, 83 N. Y. 552. Where one tenant in common brought replevin against the bailee of another joint owner, *held*, that the defendant was entitled to a verdict and judgment for the full value of the property, on waiving judgment for its return. *Russell v. Allen*, 13 N. Y. 173, *supra*. When land, on which a crop was growing, was devised in such a way as to convey it to two or more devisees, an action may be maintained by one, to recover his proportion of the crop, without

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joining the other owners. *Stall v. Wilbur*, 77 N. Y. 158. Where the goods are the joint property of several, all must join in replevin. *Decker v. Livingston*, 15 Johns. 479; *Colton v. Mott*, 15 Wend. 619; *Demott v. Hagerman*, 8 Cow. 220.

A conditional seller, who has a right to the possession of the goods at any time even before maturity of the claim, may replevin. *Payne v. Balleston*, 22 Week. Dig. 109. A bank to which a draft with accompanying collaterals has been delivered for collection, has a special interest in such collateral, which authorizes it to maintain replevin against its agent to recover the same after a proper demand. *Corn Exchange Bank v. Blye*, 2 St. Rep. 112. Gambling apparatus and lewd pictures seized and held as evidence and to be destroyed under the law cannot be replevied. *Willis v. Warren*, 17 How. 100. Replevin lies for chattels of all kinds; *Brockway v. Burnap*, 16 Barb. 309; *Hudler v. Golden*, 36 N. Y. 446; *O'Reilly v. Good*, 42 Barb. 521; *Ombony v. Jones*, 21 Barb. 520; *DuBois v. Kelly*, 10 Barb. 96; but not for real estate. *Smith v. Benson*, 1 Hill, 176. It lies for machinery of a mill severed from the real estate. *Cresson v. Stout*, 17 Johns. 116; for bonds; for money which can be identified; for domestic animals; *Sager v. Blain*, 44 N. Y. 448; *Dowes v. Bignall*, Supp. to Hill & Denio, 408; *Goff v. Kilts*, 15 Wend. 550; *Buster v. Newkirk*, 20 Johns. 75; but not for a check which has been paid. *Barnett v. Selling*, 70 N. Y. 492. To maintain replevin for promissory notes the plaintiff must show title to the identical notes; it is not enough that he is entitled to the proceeds thereof. *Black River Ins. Co. v. N. Y. State Loan, etc. Co.* 73 N. Y. 282. It will not lie for articles permanently attached to real estate. *Fryatt v. The Sullivan Co.* 5 Hill, 117.

The property must be described with reasonable certainty and be the subject of delivery. *Root v. Woodruff*, 6 Hill, 418; *Brown v. Sax*, 7 Cow. 95; *Gordon v. Hostetter*, 37 N. Y. 99; *Dewitt v. Morris*, 13 Wend. 495; *Bissell v. Drake*, 19 Johns. 66. And it will only lie when there has been a separation of chattels so as to be capable of identification. *Stevens v. Eno*, 10 Wend. 95; *Stephens v. Santee*, 49 N. Y. 35; *Crofoot v. Bennett*, 2 N. Y. 258; *Halterline v. Rice*, 62 Barb. 593. See *Clark v. Griffith*, 24 N. Y. 596. But where grain or barley has been mixed by consent the plaintiff has a right to the quantity of grain belonging to him from the common bulk. *Wilson v. Nason*, 4 Bosw. 155; *Morgan*

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v. *Gregg*, 46 Barb. 183. See *Howland v. Woodruff*, 60 N. Y. 73; *Yenni v. McNamee*, 45 N. Y. 614. So as to wood mingled by accident. *Moore v. Eric R. R. Co.* 7 Lans. 39. Simple change of form of the article does not defeat plaintiff's right — *Curtis v. Groat*, 6 Johns. 168; *Brown v. Sax*, 7 Cow. 95 — unless it afterward comes into the hands of an innocent third party. *Baker v. Wheeler*, 8 Wend. 508; *Hyde v. Cookson*, 21 Barb. 92. The owner of property may recover it, even from the vendee of the wrongful taker, so long as it can be identified. *Foslin v. Cowee*, 60 Barb. 48; *Silisbury v. McCook*, 3 N. Y. 379. A lease, of itself, is not the proper subject of replevin. *Nichols v. Masc*, 94 N. Y. 160. Goods in the possession of the property clerk in the police department in New York city are in the custody of the law, and cannot be replevied until conviction of prisoner or order of the court. *Simpson v. St. John*, 93 N. Y. 363, distinguishing *Lynch v. St. John*, 8 Daly, 143.

Where a judgment debtor, whose property had been levied on under an execution against him, sold part of it to plaintiff, claiming it to be exempt, and plaintiff brought replevin for it, *held*, that the original levy was valid, unless the property was exempt, and that the debtor alone could claim the exemption; that such exemption ceased upon the sale to plaintiff, but the levy remained in force and, as the possession of defendant continued to be lawful, plaintiff could not maintain replevin. *Harris v. Lyman*, 19 Week. Dig. 359. A receiver appointed in supplementary proceedings cannot maintain an action of replevin to recover possession of property transferred by the judgment debtor, before his appointment, by way of mortgage, when the mortgagee has taken possession; his remedy is a suit in equity. *Pettibone v. Drakeford*, 21 Week. Dig. 96; s. c., on reargument, 37 Hun, 628. Replevin will not lie against one holding property as the servant of the one in possession. *McDougall v. Travis*, 24 Hun, 590. Replevin will not lie, at suit of a stranger to the action, to recover from the sheriff goods taken under replevin process; resort must be had to the remedy given in the action. See § 1704; *Hunt v. Mootry*, 10 How. 478; *Haskins v. Kelly*, 1 Abb. (N. S.) 63; *Edgerton v. Ross*, 6 Abb. 189. As to what is, and what is not, sufficient detention of chattels to justify replevin, see *Hurt v. Kane*, 40 Barb. 638; *McDougall v. Travis*, 24 Hun, 590; *Wilton v. Holmes*, 6 St. Rep. 546.

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Possession is sufficient to maintain replevin, and defendant, in justifying must show title in himself. Proof of title in a third person will not defeat the plaintiff's right without authority from such third person. *Guilford v. Mills*, 33 St. Rep. 37, 11 Supp. 261. Where replevin was brought against an assignee for creditors and the United States marshal, in whose possession the property was, and the same day that the replevin suit was brought, United States Circuit Court issues an order to deliver the property to the assignee; *held*, that at the time the writ in replevin was executed after such order, the marshal held the property for the specific purpose of delivering to the assignee and that a levy under the writ was valid. *Lazarus v. McCarthy*, 66 St. Rep. 295, 32 Supp. 833, distinguishing *Bullis v. Montgomery*, 50 N. Y. 352.

Where a constable who has levied on goods, left them in possession of a clerk of the judgment debtor "to be held as safe keeping in storage," and they were afterwards taken in replevin against the judgment creditor and his clerk; *held*, the possession of the latter was that of bailee merely, and not servant of the constable, and the fact that he was named in the warrant was a justification to the sheriff no matter whom the property belonged to in the absence of a claim by the constable made pursuant to § 1709 and § 1710. *Hastings v. Nagel*, 83 Hun, 205, 64 St. Rep. 152, 31 Supp. 598. An action for the recovery of the plaintiff's own negotiable promissory note before it is paid, may be maintained the same as for any chattel, and where a case is made out of disposing of a chattel so that it cannot be found or taken by the sheriff, and with the intention that it shall not be so taken, an order of arrest is properly issued in an action brought by the maker of a note to recover possession thereof. *Ertell v. De Pennebet*, 14 Civ. Pro. R. 336, 17 St. Rep. 742.

Replevin lies for the possession of a check for the payment of money. To support the action plaintiff must have such an interest as gives him the right of immediate possession and the title must be a legal one, not one enforceable in equity merely. *Haas v. Altieri*, 2 Misc. 252, 50 St. Rep. 341, 21 Supp. 950. Where the defendant lawfully obtained possession of the property and does not wrongfully dispose of it, his possession of the property in judgment of law at the time of the commencement of the action must be shown. *National Steamship Co. v. Sheahan*, 122 N. Y. 461. As to the right to maintain replevin where claim was made

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of partnership between the plaintiff and the person from whom defendant obtained title, see *Soltan v. Loewenthal*, 1 Supp. 168.

Where an injunction was granted in an action for personal property, restraining the defendant from disposing of the property, and thereafter plaintiff assigned his interest to one who demanded the property of defendant, it was held that the refusal of defendant to give up the property did not constitute a wrongful detention authorizing replevin. *Sherman v. Jenkins*, 24 Supp. 186, 53 St. Rep. 780. When an infant pleads minority to escape payment of the purchase price for goods, the seller may rescind the sale and replevin the goods. *Wheeler & Wilson Mfg. Co. v. Jacobs*, 2 Misc. 236.

SUB. 3. WHEN THE ACTION CANNOT BE MAINTAINED.

§§ 1690, 1691.

§ 1690. [Am'd, 1894.] When it cannot be maintained.

An action to recover a chattel cannot be maintained in either of the following cases:

1. Where the chattel was taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment or fine, issued in pursuance of a statute of the State or of the United States; unless the taking was, or the detention is, unlawful, as specified in section sixteen hundred and ninety-five of this act.
2. Where it was seized by virtue of an execution, or a warrant of attachment, against the property of the plaintiff, unless it was legally exempt from such seizure, or is unlawfully detained, as specified in section sixteen hundred and ninety-five of this act.
3. Where it was seized by virtue of an execution, or a warrant of attachment against the property of a person other than the plaintiff, and at the time of the commencement of the action the plaintiff had not the right to reduce it into his possession.

§ 1691. *Id.*; after judgment against the plaintiff.

Where a chattel is replevied, in an action to recover the same, and a final judgment awarding the possession thereof to the defendant is rendered, a subsequent action to recover the same chattel cannot be maintained by the plaintiff, for the same cause of action. But the judgment does not affect his right to maintain an action to recover damages, for taking or detaining the same or any other chattel, unless it was rendered against him upon the merits.

A party whose property is taken for a tax thereon under a legal warrant for its collection, cannot maintain an action against the collector for its recovery by showing that it was illegally imposed. *Niagara Elevated Co. v. McNamara*, 2 Hun. 419. Though a warrant to collect a tax may have been issued erroneously or irregularly, if, on its face, it gives authority to collect, replevin

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cannot be sustained for the property taken. *Troy & L. R. R. Co. v. Kane*, 72 N. Y. 614; *Savacool v. Boughton*, 5 Wend. 178. The protection extends to taxes collected under a law of Congress. *O'Reilly v. Good*, 42 Barb. 521. Nor can personal property, subject to execution, be replevied, where an officer holds it under a tax warrant properly issued against plaintiff. *Hudler v. Golden*, 36 N. Y. 446.

Replevin lies for plaintiff for property taken from his possession under process against a third party. *Judd v. Fox*, 9 Cow. 259; *Thompson v. Button*, 14 Johns. 84; *Deutsch v. Reilly*, 8 Daly, 132. Or, if the judgment or determination on which the process was issued was void for want of jurisdiction, or of authority in the tribunal to pronounce it, replevin lies. *Mills v. Martin*, 19 Johns. 7. An unauthorized levy by an officer on personal property, without either sale or removal, is a trespass, and replevin lies against the officer and plaintiff who directed it without demand. *Stewart v. Wells*, 6 Barb. 79; *Allen v. Crary*, 10 Wend. 349; *Chapman v. Andrews*, 3 Wend. 240; *Masten v. Webb*, 24 Hun, 90; *Alvoord v. Haynes*, 13 Hun, 26; and no demand is necessary, *Stillman v. Squire*, 1 Den. 317. Unlawful interference with the property is sufficient to authorize the action. *Fonda v. Van Horne*, 15 Wend. 631; *Knapf v. Smith*, 27 N. Y. 277; *Neff v. Thompson*, 8 Barb. 213. The owner may replevy from one who has taken the goods from the owner's agent or servant on an execution against such agent or servant. *Clark v. Skinner*, 20 Johns. 465. As a rule goods in the custody of the law cannot be replevied. *Hall v. Tuttle*, 2 Wend. 475. It is said it makes no difference whether the execution under which they were seized is satisfied. *Gardner v. Campbell*, 15 Johns. 401. If a tax collector illegally seizes the property of one person to satisfy the tax of another, the owner may maintain replevin in such case; it is not taken "by virtue of a warrant." *Dubois v. Webster*, 7 Hun, 371; *Hallock v. Rumsey*, 22 Hun, 89; *Lake Shore & M. S. R. R. Co. v. Roach*, 80 N. Y. 339; *Ncal v. O'Brien*, 7 Hun, 371; *Stockwell v. Veitch*, 15 Abb. 412. But as to the rule where the officer finds the property in the possession of the delinquent tax payer, see *Sheldon v. Van Buskirk*, 2 N. Y. 473. Where the warrant is not regular on its face replevin will lie. *Wood v. Orscr*, 25 N. Y. 348.

It was early held, and has been steadily maintained, that prop-

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erty levied upon by an officer, when found in and taken from the possession of the defendant in the execution, cannot be replevied unless in a case where the taking was tortious and the officer liable in trespass; *Thompson v. Button*, 14 Johns. 84; *Pangburn v. Partridge*, 7 Johns. 142; and that illustrates the difference between taking on execution and on a writ of replevin. In the former case he is required to take only the property of the debtor, and is a trespasser if he takes that of a stranger; but in the latter he is required to take certain specific property, and is not a trespasser, and cannot be sued for taking it. His possession under the writ and his power to obey it are thus perfectly protected, and his taking is entirely unaffected by the question of ownership. *First Nat. Bank, etc., v. Dunn*, 97 N. Y. 149.

Where stock was borrowed by one defendant for the purpose of obtaining a loan thereon, and afterwards he purchased an undivided half interest in the stock from the lender who subsequently sold all his interest therein to plaintiff's intestate, it was held there was no basis for replevin by plaintiff as co-tenant in common. *Barrowcliffe v. Cummins*, 66 Hun, 1, 49 St. Rep. 776, 20 Supp. 787. The fact that an assessment by a school trustee was for a larger sum than was authorized by law, does not afford a ground for replevying chattels taken upon failure to pay the tax; the trustee having jurisdiction the assessment is not invalid and the remedy is by *certiorari*. *Norris v. Jones*, 7 Misc. 198, 56 St. Rep. 514, 27 Supp. 209.

Replevin cannot be maintained to recover property into which money wrongfully obtained from plaintiff has been converted by the wrongdoer. The remedy in such case is in equity. *Togt Mfg. & Coach Lace Co. v. Ottinger*, 88 Hun, 83, 34 Supp. 729, 68 St. Rep. 547. The provision of § 1691 does not affect plaintiff's right to maintain an action to recover damages for taking or detaining a chattel, but relates simply to an unsuccessful plaintiff and a judgment not obtained on the merits, not to a case where judgment was rendered on the merits in his favor. *Commerce Exchange Nat. Bank v. Blye*, 123 N. Y. 132.

Where a sale and delivery of goods is procured by fraudulent representations on the part of the purchaser, the title and possession passed to him notwithstanding fraud, subject to the right of the vendor to rescind the contract of sale, and where prior to any act on the part of the vendor showing an intent to rescind

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such contract, the goods had been levied upon by virtue of an attachment against the purchaser, replevin to recover the goods was not maintainable. It seems the remedy of the vendor in case of the refusal of the sheriff to deliver the goods on demand, is an action for conversion. *Wise v. Grant*, 140 N. Y. 593.

Where a plaintiff at the time he commences an action neither has possession nor the right to possession of property, he cannot maintain replevin, where the defendant in an execution had an interest in the property which was subject to levy and sale on an execution against him and the property was in possession of the sheriff. *Savall v. Wanful*, 21 Civ. Pro. R. 18. An action will not lie to recover damages for the depreciation in value of property which has been the subject of an action of replevin after judgment in favor of the plaintiff and pending an appeal and affirmance thereof. *Commerce Exchange Nat. Bank v. Blye*, 123 N. Y. 132, reversing 56 Hun, 403, 31 St. Rep. 469, 10 Supp. 151.

Where the property of a person is seized by virtue of a warrant of attachment against another, his remedy is by an action for conversion, and not by a replevin suit. *Asher v. Deyoe*, 77 Hun, 531, citing *Wise v. Grant*, 140 N. Y. 593, reversing 49 St. Rep. 439, and holding that where a sale and delivery of goods are procured by fraudulent representations of a purchaser, the title and possession passed to him notwithstanding the fraud, subject to the right of the vendor to rescind the contract of sale, and that replevin is not maintainable to recover the goods where before the rescission of such contract the goods had been levied upon by virtue of an attachment against the purchaser. Where goods are in the possession of a sheriff under a writ of replevin, an action to replevy them from him cannot be maintained. *McCarthy v. Ockerman*, 92 Hun, 19, 37 N. Y. Supp. 914, 73 St. Rep. 42.

A vendor of goods cannot maintain an action of replevin against a sheriff who has seized them under execution against the vendee, where he did not rescind the sale before the levy. A mere statement to the vendee of a belief that he was insolvent when he purchased is not equivalent to notice of rescission, nor is any mental determination to seize the goods, nor instructions to an attorney to do so, not communicated to the vendee, effectual to work a rescission. *Borgfeldt v. Wood*, 92 Hun, 260, 36 N. Y. Supp. 612, 71 St. Rep. 751.

A banker's lien for advances on goods, where neither the pos-

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session of the goods nor the bills of lading were delivered, is only an equitable one and will not support replevin. An equitable right to possession of property is not sufficient to support an action of replevin. *National Bank of Deposit v. Rogers*, 1 App. Div. 623, 37 N. Y. Supp. 365, 72 St. Rep. 533. Plaintiff cannot maintain replevin where he derives title to what is claimed to be exempt property from the judgment debtor, as the debtor alone can claim the exemption and it ceased upon the sale to a third party. *Harris v. Lyman*, 19 Week. Dig. 359.

A steamship company cannot maintain replevin for tickets in possession of sub-agents to whom they have been delivered by defendant with the assent of the plaintiff. *National Steamship Co. v. Sheahan*, 13 St. Rep. 429. A carrier whose charges have been paid cannot maintain replevin where goods have been taken from him on attachment valid on its face and levied upon under an execution valid on its face. *Livingston v. Miller*, 48 Hun, 232. The fact that the purchaser of goods on credit knew that he was insolvent does not entitle the seller to rescind and replevy the goods unless the insolvency was of such a hopeless character that the purchaser must have known he would not be able to pay for the goods when the credit expired. *Bach v. Tuck*, 10 Supp. 884.

Plaintiff leased a farm with stock in which he and the tenant were jointly interested; the tenant left before the expiration of his term indebted to plaintiff and to others, the farm produce having been seized upon attachments plaintiff replevied them, upon the trial it did not appear that the title to the hay and grain was reserved to plaintiff and that the tenant agreed to feed enough of it on the farm to support the stock, *held*, plaintiff was not entitled to replevin the property. *Colville v. Miles*, 38 St. Rep. 132.

SUB. 4. AGAINST WHOM THE ACTION CAN BE MAINTAINED.

Title in the plaintiff and wrongful taking by defendant are the requisite substantial facts to justify replevin. It is not necessary to allege in terms detention of the property by the defendant in such case, that is only necessary in an action in the nature of replevin in the detinet. The action is founded upon the wrongful taking and can be maintained although the defendant before its commencement may have parted with the possession of the property. *Hoffman v. Markham*, 88 Hun, 18, citing *Brockway v. Burnap*, 16 Barb. 309; *National Steamship Co. v. Sheahan*, 122 N. Y. 465.

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The owner of a chattel may, in general, replevy it from any person who has it in his possession and who has no right to retain it as against him. It seems a receiver or other officer of the court is not protected against replevin or other common-law action brought by a third person claiming paramount title to property in his possession as receiver. It is a matter of course in such case to permit suit to be brought; if the action has been brought without such permission the court will, if the conduct of plaintiff has not been willful, permit the action to proceed. *Read v. Brayton*, 143 N. Y. 342.

There must be a wrongful detention at time suit is brought. *Savage v. Perkins*, 11 How. 17. But the action may be maintained if the person has parted with the possession for the purpose of avoiding the writ. *Drake v. Wakefield*, 11 How. 107; *Ellis v. Lorimer*, 23 N. Y. 264. A mere neglect to deliver goods on demand, if not actually in the possession of defendant, is held not sufficient to justify the action. *Hill v. Cazel*, 1 N. Y. 522; *Hawkins v. Hoffman*, 6 Hill, 586; *Miller v. Illinois Cent. R. R. Co.* 24 Barb. 313. As to when an action can be maintained against a plaintiff when goods have been seized under his process, and when against the officer, see *Smith v. Orser*, 43 Barb. 187; *Wood v. Orser*, 25 N. Y. 345; *Allen v. Crary*, 10 Wend. 349; *Mount v. Derick*, 5 Hill, 456; *Hunt v. Kane*, 40 Barb. 638. Replevin lies by the owner of chattels against one who had no possession or connection therewith other than to direct a sheriff to levy an execution thereon in his favor. *Knapp v. Smith*, 27 N. Y. 277. Though an assignment has been made, and the property sought to be recovered has passed to the possession of the assignee, it is proper to bring the action of replevin against him individually, as the property is in his possession. *Hampshire Paper Co. v. Hunt*, 9 St. Rep. 31. A third person who makes claim for property replevied after the sheriff has taken possession, is not a necessary, or proper party to the action, as a complete determination of the controversy between the original parties could be had without his presence or affecting his rights, and the order directing him to be brought in is erroneous. *King Co. v. Seed*, 6 Misc. 4, 58 St. Rep. 116, 25 Supp. 1115.

A motion by sureties on an undertaking given to procure redelivery of chattels replevied, to open a default and allow them to be substituted in the replevin action, is properly denied when it

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appears that the judgment recovered therein has been paid. *Clemmons v. Gorman*, 7 Misc. 45, 27 Supp. 354, 57 St. Rep. 61. The judgment debtor against whose property execution was issued has an interest in the subject of an action of replevin against the sheriff, brought by a claimant of goods levied upon, and the court has power under § 452 to grant his application to be allowed to come in and defend. *Rosenberg v. Salomon*, 144 N. Y. 92, 38 N. E. Rep. 982, 63 St. Rep. 62, affirming *Rosenberg v. Courtney*, 8 Misc. 616, 29 Supp. 327, 60 St. Rep. 823.

An undertaking to save and hold harmless a sheriff from all damages by reason of a levy made by him given after the commencement of action to replevy the goods levied upon is within § 1421 of the Code, and the obligors are entitled to be substituted as defendants in the action. *Hart v. Sexton*, 11 Misc. 446, 32 Supp. 232, 65 St. Rep. 420. A substitution of a defendant in a replevin suit in the place of the original defendant who did not reclaim and the issuance of an order directing that the property be turned over to the defendant so substituted, was held erroneous because the provisions of the Code, §§ 1704 and 1709, were not resorted to. *Pelham Hod Elevating Co. v. Baggaley*, 34 St. Rep. 691, 12 Supp. 218.

Where a person gives direction in the issuing the legal process against personal property, and after the sale thereunder receives the proceeds, he is liable therefor. *Bean v. Edge*, 46 Supr. 455. Replevin lies against a sheriff who sells after a tender of the full amount due on execution. *Tiffany v. St. John*, 65 N. Y. 314, affirming 5 Lans. 153, and against a sheriff who levies on the right, title and interest of the execution debtor in property in which he had, in fact, no interest. *Waid v. Gaylord*, 1 Hun, 607; *Alvord v. Haynes*, 13 Hun, 26. Where a party instigates and directs an officer having a void attachment, to take goods, he is liable though the officer has other like void process for others. *Whele v. Butler*, 61 N. Y. 245.

An officer executing replevin process is not protected thereby if he takes the property from the possession of any other person than the defendant named therein or his agent. *Hess v. Sprague*, 13 Week. Dig. 164; *Sheffield v. Clark*, 12 Week. Dig. 226.

Replevin lies against one who has innocently purchased from one having no title, who himself sells the goods. *Ross v. Cassidy*, 27 How. 416. The action may be maintained although defend-

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ant has wrongfully parted with possession of the goods before suit brought. *Brockway v. Burnap*, 16 Barb. 309, reversing 8 How. 188, 12 Barb. 347; *Nichols v. Michael*, 23 N. Y. 264; *Latimer v. Wheeler*, 1 Keyes, 468; *Dunham v. Troy Union R. R. Co.* 3 Keyes, 543, affirming 30 Barb. 485; *Knaapp v. Smith*, 27 N. Y. 277, approving *Allen v. Crary*, 10 Wend. 349.

Replevin for goods obtained from plaintiff by fraudulent representations by a purchaser, may be maintained against auctioneers having actual possession of the goods by delivery to them for the purpose of sale from a subsequent purchaser with notice. *Grossman v. Walters*, 11 Supp. 471. Where defendant had contracted with plaintiff that he should appoint certain sub-agents and furnish them with tickets, and did so, and on the termination of the agency he notified the sub-agents to return the tickets to him, and returned all that came into his hands to plaintiff, it was held replevin was not maintainable against him. *National Steamship Co. v. Sheahan*, 122 N. Y. 461.

SUB. 5. WHEN DEMAND OR TENDER NECESSARY.

Where the taking is wrongful no demand is necessary. *Moses v. Walker*, 2 Hilt. 536; *N. Y. Car Oil Co. v. Richmond*, 10 Abb. 185; *Pierce v. Van Dyke*, 6 Hill, 613; *Foshay v. Ferguson*, 5 Hill, 154; *Sluyter v. Williams*, 37 How. 109; *Cummings v. Vorce*, 3 Hill, 282; *Farrington v. Payne*, 15 Johns. 432; *Ross v. Cassidy*, 27 How. 416; *Stillman v. Squire*, 1 Den. 327; *Talcott v. Belding*, 46 How. 419; *White v. Brown*, 5 Lans. 78; *Roth v. Palmer*, 27 Barb. 652; *Connah v. Hale*, 23 Wend. 463. But where the defendant came rightfully in possession of the property, demand should be made before suit. *White v. Dodds*, 28 How. 197; *Tallman v. Turck*, 26 Barb. 167; *Fuller v. Lewis*, 13 How. 219; *Boughton v. Bruce*, 20 Wend. 234; *Brown v. Cook*, 9 Johns. 361. Demand is not necessary for stolen goods in hands of innocent party. *Kelsey v. Gristwold*, 6 Barb. 36; *Hall v. Robinson*, 2 N. Y. 295. The refusal is not the act for which replevin lies, but is the evidence of conversion. *Rateley v. Brown*, 18 Hun, 456; *Lockwood v. Bull*, 1 Cow. 322; *Jessop v. Miller*, 1 Keyes, 321; *Hill v. Corvill*, 1 N. Y. 523; *Bristol v. Burt*, 7 Johns. 254; *Purves v. Moltz*, 5 Rob. 653. Where defendant fraudulently obtains possession of the goods no demand is necessary. *Foshay v. Ferguson*, 5 Hill, 158. Where an officer seizes property of one who is

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a stranger to his process, no demand is necessary. *Alvord v. Haynes*, 13 Hun, 26; *Masten v. Webb*, 24 Hun, 90. Demand must be made before suit brought, and of one having custody of the goods and who is able to deliver them. *Andrews v. Shattuck*, 32 Barb. 397; *Whitney v. Slauson*, 30 Barb. 276; *Cummings v. Verce*, 3 Hill, 282; *Boughton v. Bruce*, 20 Wend. 234. And where the plaintiff's case depends upon a wrongful detention, without a wrongful taking, an averment in the complaint of a demand and refusal is necessary. *Schofield v. Whitelegge*, 49 N. Y. 259, distinguishing *Levin v. Russell*, 42 N. Y. 251. See *Treat v. Hathorn*, 3 Hun, 646, as to the rule in the two cases. The former case is approved as is also *Southwick v. First National Bank*, 84 N. Y. 420; in *Goodwin v. Wertheimer*, 99 N. Y. 149, which latter case is cited in *Castle v. Corn Exchange Bank*, 148 N. Y. 126.

Where plaintiff has been deprived of his property by defendant's illegal act no demand is necessary. *McCoon v. Geils*, 5 Week Dig. 486. Where property is taken after notice that it belonged to plaintiff, a demand is not necessary before suit. *Hallett v. Carter*, 19 Hun, 629. A sale on execution of goods seized under attachment and assigned by the owner subject to the attachment is a conversion without demand. *Hicks v. Cleveland*, 48 N. Y. 84. No demand is necessary of a defendant who is not a *bona fide* purchaser. *Salamon v. Van Praag*, 2 Week. Dig. 28. But there must be a demand and refusal before a purchaser at a sheriff's sale in good faith, under an execution, of goods in the possession of the judgment debtor, is liable to an action by the true owner. *Rawley v. Brown*, 18 Hun, 456; *Gillett v. Roberts*, 57 N. Y. 28. Where an agreement is made to receive milk in cans and return the cans, a failure to so return does not show conversion unless a demand is proved. *Ryerson v. Kauffield*, 13 Hun, 389. Mere non-delivery does not constitute a conversion, but a denial of right or title on demand does. *Nelson v. Neil*, 12 Week. Dig. 154. A demand need not be in any particular form. It is sufficient if the owner assert his title and his desire to reclaim his property. *Tuttle v. Hazard*, 86 N. Y. 628. As to what is not a sufficient demand before suit, see *Wheeler v. Allen*, 51 N. Y. 37. And where demand is necessary, it is sufficient if made by sheriff before service of papers. *Woodcock v. Roberts*, 66 Barb. 498. If, on demand, the defend-

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ant offers to unconditionally return the property, the object of the suit is already attained and replevin will not lie. *Savage v. Perkins*, 11 How. 17. If property is delivered to plaintiff before service of summons, etc., suit will not lie. *Dows v. Green*, 3 How. 377; *Nosser v. Corwin*, 36 How. 540; *Christie v. Corbett*, 34 How. 19. As to what constitutes a demand and refusal, see *Richards v. Pitts Agricultural Works*, 37 Hun, 1, followed, *Mather v. Freelove*, 3 St. Rep. 424.

Where goods have been sold through the fraudulent representation of the buyer as to his solvency, the seller cannot maintain an action to recover them against the innocent assignee of creditors of the buyer without proving a demand on the assignee of the goods, and his refusal to comply, and its necessity is not dispensed with by the claim in defendant's answer that he owns the goods or because he retook them from the sheriff. *Goodwin v. Goldsmith*, 49 Supr. Ct. 101, and cases cited.

In an action brought against an assignee to recover goods fraudulently obtained by his assignor, a demand and refusal must be alleged and proved. *Cutwiskeny v. Lewis*, 15 St. Rep. 364, citing *Goodwin v. Werthwimer*, 99 N. Y. 149. Proof of demand by attorney is sufficient where no question as to his authority is made and the defendant refuses to deliver on ground of ownership. *Brooks v. Conner*, 10 Daly, 183. A demand for a return of goods is not a condition precedent to the maintenance of the action of replevin against one who wrongfully took possession of them. *Coie v. Carl*, 82 Hun, 360, 31 Supp. 565, 64 St. Rep. 155; *Schwabeland v. Holohan*, 10 Misc. 176, 62 St. Rep. 518, 30 Supp. 910, citing *Masten v. Webb*, 24 Hun, 90; *Stillman v. Squires*, 1 Den. 327.

Where a sale is rescinded on the ground of fraud and the sheriff is in possession of the goods without notice to the vendor as to how he became so, a demand upon him is sufficient for the purposes of replevin. *Schwabeland v. Buchler*, 8 Misc. 86, 58 St. Rep. 831, 28 Supp. 523. On a sale for cash and where the purchaser made a payment on account and took possession of part of the goods and refused to accept the remainder or pay the balance, it was *held*, that as the sale was indivisible, the seller could maintain replevin to recover all the goods, and that he was not bound to restore the payment which had been made before he could repossess himself of the property. *Thompson v. McLean*, 14 Supp. 55.

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The refusal of a servant to deliver goods intrusted to him by his master is not sufficient evidence to maintain replevin against either where a demand and refusal is necessary, unless the servant acted under the direction of the master. *Goodwin v. Wertheimer*, 99 N. Y. 149. Proof that the party in possession asserts a title in a third person is sufficient to justify the finding of the refusal. *Tuttle v. Hazard*, 86 N. Y. 628.

Under a lease providing that the hay raised on the farm should be fed to the stock the landlord and tenant each owning half the hay, and that each was to have one-half of all the crops, defendant's stock and some of the hay was destroyed by fire; defendants removed the residue of their stock, and all the hay and grain remaining, *held*, that since plaintiff was entitled to possession until the end of the term under the lease, defendant's taking was unlawful and no demand was necessary to perfect plaintiff's right of action. *Adam v. Loomis*, 8 Supp. 17.

If a bailee refuses to deliver goods to a bailor because he intends to litigate the title, a tender of fees for storage is not necessary. *L. I. Brewery Co. v. Fitzpatrick*, 18 Hun, 389. In an action to recover goods by one holding the title as security for advances against one who has acquired the interest of the debtor, it is not necessary to tender the amount which has been paid on the debt. *First National Bank of Toledo v. Shaw*, 61 N. Y. 283; S. C. 69 N. Y. 624.

Where one claims to recover the possession of property on the ground that it was only leased, and defendant claims as purchaser, plaintiff must not only tender, but must keep his tender good by a deposit of the money, or an offer at the time to pay into court. *Dodge v. Ferry*, 19 Hun, 277. A wrongdoer can only claim to be made good, and a tender of any sum due him, by reason of payment on account when goods obtained by him by fraud have been replevied, is sufficient on the trial. *Schoonmaker v. Kelly*, 42 Hun, 299. As to repayment of moneys advanced in such cases, see *Lewisohn v. Apple*, 7 St. Rep. 223. And in case of such fraudulent act the defendant, or his general assignee, cannot claim, as a matter of right, to be refunded any moneys advanced or paid by them on account of the goods. *Pearse v. Pettes*, 47 Barb. 276; *Ladd v. Moore*, 3 Sandf. 589; *Kinney v. Keenan*, 49 N. Y. 172. A tender of money or property received upon a fraudulent sale is not a condition precedent to an

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action to recover possession of the goods sold, where such goods have passed into possession of a third person other than a *bona fide* purchaser for value. *Dalle v. Reinhart*, 27 St. Rep. 944.

SUB. 6. ELECTION OF REMEDIES.

The remedy by way of replevin is inconsistent with an action for conversion or with an affirmation of a contract for purchase of goods obtained by fraud. *Scymour v. Van Curen*, 18 How. 94; *Dows v. Green*, 32 Barb. 490; *Morris v. Rexford*, 18 N. Y. 552; *Bank of Beloit v. Beale*, 34 N. Y. 473. When the owner of personal property has been deprived of it by the wrongful acts of a stranger amounting to conversion, two courses are open to him,—he may sue in conversion to recover the value of the property, or in replevin to recover the property itself and damages for its withholding, but he cannot simultaneously pursue both remedies. *Baumann v. Jefferson*, 4 Misc. 147, citing *Van Orden v. Van Orden*, 10 Johns. 30; *Winter v. Livingston*, 13 Johns. 54; *Oatman v. Taylor*, 29 N. Y. 649; *Rodermund v. Clark*, 46 N. Y. 354; *Bridgford v. Crocker*, 60 N. Y. 627; *Moller v. Tuska*, 87 N. Y. 166; *Linden v. Fritz*, 3 Am. L. J. 421; *Benedict v. Bank*. 4 Daly, 171; *Becker v. Walworth*, 45 Ohio. St. 169; *Tate v. Liggat*, 2 Leigh, 84; *Lane v. Lutz*, 1 Keyes, 203; *Morris v. Rexford*, 18 N. Y. 552; *Blessey v. Kearney*, 24 La. Ann. 289; *Philadelphia, etc. Co. v. Howard*, 13 How. (U. S.) 307.

ARTICLE III.

PLEADINGS AND DEFENCES. §§ 1720–1725.

SUB. I. THE COMPLAINT. §§ 1720, 1721.

2. THE ANSWER AND DEFENCES. §§ 1723, 1724, 1725.

SUB. I. THE COMPLAINT. §§ 1720, 1721.

§ 1720. Title; how stated in pleading.

An allegation, in a pleading interposed by either party, to the effect that the party pleading, or a third person, was, at the time when the action was commenced, or the chattel was replevied, as the case may be, the owner of the chattel, or that it was then his property, is a sufficient statement of title, unless the right of action or defence rests upon a right of possession, by virtue of a special property; in which case, the pleading must set forth the facts upon which the special property depends, so as to show, that at the time when the action was commenced, or the chattel was replevied, as the case may be, the party pleading, or the third person, was entitled to the possession of the chattel.

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§ 1721. Taking, etc.; how stated in complaint.

Where the complaint contains a sufficient statement of the plaintiff's title, a general allegation, that the defendant wrongfully took the chattel, is sufficient, without setting forth the facts, showing that the taking was wrongful. Where the taking of the chattel is not complained of, but the action is founded upon its wrongful detention, the complaint must set forth the facts, showing that the detention was wrongful.

It is held in *Newall Universal Mill Co. v. Muxlow*, 115 N. Y. 170, reversing 51 Hun, 453, that the rules of pleading and practice at common law and under the Revised Statutes, peculiar to replevin, were superseded by the Code.

The following note to the above sections is given by the codifiers:

NOTE.—The Code of Procedure contained no provision specially relating to the pleadings in replevin, except the direction, in section 166, respecting the form of the answer when the property was distrained, the substance of which will be found in section 1724, *post*. The adaptation of the general provisions of the Code of Civil Procedure concerning pleadings, to the principles of the common law relating to pleading in replevin and detinue, and to the provisions of the R. S. on the same subject, gave rise to many doubtful questions, and consequently to much embarrassment and conflict of opinion. A few sections have accordingly been prepared expressly for the purpose of settling the most important of these questions. This section, which is the first of the series, commences with a provision substantially to the effect that an allegation of property in a party or a third person is an allegation of fact. This is in accordance with the rule prevailing under the former system, which went so far as to require affirmatively such an allegation in all cases. It has even been held that an averment that the defendant took out of the plaintiff's possession goods to the possession of which the plaintiff was lawfully entitled was insufficient. *Pattison v. Adams*, 7 Hill, 126; *Bond v. Mitchell*, 3 Barb. 304. In various adjudications under the Code of Procedure it has been held that a general allegation of property was an issuable allegation of fact. *Vogel v. Babcock*, 1 Abb. Pr. 170; *Hunter v. Hudson R. I. & M. Co.* 20 Barb. 493; *Davis v. Hoppock*, 6 Duer, 254; *Simmons v. Lyons*, 3 J. & S. 554; *Tell v. Beyer*, 38 N. Y. 161. But where the party is an officer or other person having only a special property in the goods, an allegation that he is the owner would conflict with the modern principles of pleading and would prevent him from making the proper verification, but it seems that the former rule allowed no exception even in such a case. *Vandenburgh v. Van Valkenburgh*, 8 Barb. 217. Accordingly this section qualifies the permission to plead in this general form by inserting such an exception.

The holding in *Scotfield v. Whitelegge*, 49 N. Y. 259, relates to the allegations as to the taking of the property, and also the demand, and hence is pertinent to §§ 1720 and 1721. It is there held that the complaint must show a right of property and of possession in plaintiff. An allegation of wrongful detention is not sufficient. The latter is a conclusion of law, the former of the facts upon

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which it is based. The facts must be pleaded, and without them the conclusion of law is an immaterial statement. An omission to allege these facts in the complaint is not cured by an averment in the answer denying ownership in the plaintiff. Where the plaintiff's case depends upon a wrongful detention without a wrongful taking, an averment in the complaint of a demand and refusal is necessary. The case of *Levin v. Russell*, 42 N. Y. 251, is then distinguished and explained on the ground that in that case there was no motion to dismiss the complaint for its insufficiency, and proof was made at the trial, without objection, of the facts, and further that the complaint there alleged that the property was that of the plaintiff, although it is said that fact does not appear in the case as reported. In that case, as appears in the opinion of Grover, J., the complaint alleged that "defendant had become possessed of, and wrongfully withheld from the plaintiff the following goods," etc., describing them, and concluded with a demand of judgment for their delivery to plaintiff, and for damages for their detention. It is held that the complaint contains all the allegations necessary to maintain the action, and that the judgment rendered was in accordance with the complaint. There was proof given showing a demand and refusal. These cases were followed by *Van Der Minden v. Elsas*, 36 Super.Ct. 66, holding (1873) that, in an action for the claim and delivery of personal property, the allegation "that the defendants have become possessed of, and wrongfully detain from the plaintiff the following goods and chattels of the plaintiff," describing them, is sufficient to allege that the ownership of the property was in the plaintiff, under the decision of the Court of Appeals in *Levin v. Russell*, 42 N. Y. 251, *supra*, referred to and approved in the opinion of the court in *Scofield v. Whitelegge*, 49 N. Y. 259, and, therefore, should be sustained on demurrer.

In *Treat v. Hathorn*, 3 Hun, 646 (1875) it was held that, where property came rightfully into the possession of the defendants, to maintain replevin for a wrongful detention, a demand and refusal must be shown, and it is said, that it seems to be held in *Scofield v. Whitelegge*, that it must also be averred, but, further, that the case does not fall within that decision, because here was a distinct averment of ownership, and because no question was made upon the trial as to the sufficiency of the complaint, and there was distinct proof given by plaintiff of a demand before suit

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brought, and a refusal by defendant, the defendant putting himself upon his lien. The court there says: "That brings the case within *Levin v. Russell*, which was not intended to be overruled by *Scofield v. Whitelegge*." In *Chapin v. Merchants' National Bank*, 31 Hun, 529, it is held, that it is not necessary, under § 1721, to allege, in the complaint, any facts showing the detention to be unlawful, and a demurrer interposed on that ground was overruled; the court holds that *Scofield v. Whitelegge* is entirely different, the complaint did not allege ownership by plaintiff, or demand by him, or refusal by defendant, and the opinion of the court and reference to the printed papers in *Levin v. Russell* show that if there had been an allegation of plaintiff's ownership, and of a demand and refusal, the case would have stood very differently. Pomeroy on Remedies, § 550, criticises the interpretation of the complaint in *Scofield v. Whitelegge* as technical. That case is cited in *Tooker v. Arnoux*, 76 N. Y. 401; *Talcott v. Belding*, 36 Supr. Ct. 84; *Garden v. Scoville*, 1 How. (N. S.) 272; *Morrison v. Lewis*, 39 Supr. Ct. 178; *Hopkins v. Dandron*, 52 Supr. Ct. 529. In *Siedenbach v. Riley*, 36 Hun, 211, 111 N. Y. 560, it is held that an averment in a complaint, that the defendant unlawfully detains the plaintiff's property is made out by proof of a demand. It is never necessary to plead the evidence. The complaint in an action alleged plaintiff had been, and then was, the owner of certain personal property; that the same came into the defendant's possession; that plaintiff had requested defendant to retain it; that defendant had refused and converted it to his own use; *held* good. 31 Hun, 529, *supra*.

The complaint must contain a direct averment of ownership in plaintiff; allegations of evidence of such ownership are not sufficient. 1 How. (N. S.) 272, *supra*. It is questioned in *Davenport, etc. Co. v. Taussig*, 31 Hun, 563, whether § 1721 applies to any other cases than those involving the detention of a chattel *eo nomine*, when the possession thereof has been improperly usurped by defendant and not procured by a sale fraudulently induced. An averment, etc., "were the goods of the plaintiff," is sufficient; an averment of demand and refusal is not necessary where the action is for a wrongful taking as well as for a wrongful detention. An averment that the property is wrongfully detained is sufficient. *Simmons v. Lyons*, 35 Super. Ct. 554, affirmed, 55 N. Y. 671. Where the plaintiff's case depends upon a wrongful

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detention, without a wrongful taking, an averment in the complaint of demand and refusal is necessary. *Sluyter v. Williams*, 37 How. 109; *Pierce v. Van Dyke*, 6 Hill, 613.

But a complaint which merely alleges that the "defendant became possessed of the chattels," should aver a demand. *Cochran v. Gottwald*, 40 Super. Ct. 442. An allegation that the plaintiff was the owner and entitled to the immediate possession of goods, was held to be an allegation of fact. *Walter v. Lockwood*, 23 Barb. 228; *Davis v. Hoppock*, 6 Duer, 254. No distinctive form of complaint is required in the action for claim and delivery of personal property, other than the general requirements of all pleadings under the Code. *Western R. R. Co. v. Bayne*, 75 N. Y. 1. A complaint alleging that plaintiff is the owner and entitled to the immediate possession of property of a specified value; that the defendant became possessed thereof wrongfully; that plaintiff demanded a delivery thereof to him, which was refused; that the defendant converted the same to his own use, and praying for a delivery of the property, with a specified amount of damages for its detention, permits an action for claim and delivery under the Code. *Banfield v. Haeger*, 45 Super. Ct. 428. The complaint must allege a general or specific ownership in plaintiff. *Scofield v. Whitelegge*, 49 N. Y. 259. A statement that plaintiff converted the property is unnecessary, but does not affect the complaint. *Vogel v. Babcock*, 1 Abb. 176. Where the complaint claimed only a part of the property mentioned in the complaint and requisition, it appearing that the other part had been taken from the defendant by an attaching creditor before summons served, *held*, good. *Kerrigan v. Ray*, 10 How. 213.

The allegation in the complaint that the defendant has become possessed of, by forcibly taking from plaintiffs and wrongfully detains from the plaintiffs, the following goods and chattels of the plaintiffs, sufficiently states ownership in the plaintiffs. *Van Derminde v. Elsas*, 35 Supr. Ct. 66. It is not sufficient to allege that plaintiff is entitled to the possession of the goods and that they are his property by virtue of attachments duly issued by a justice of the peace and delivered to plaintiff to be executed. *Vandenburg v. Van Valkenburgh*, 8 Barb. 217; *Bond v. Mitchell*, 3 Barb. 304. It is sufficient if the complaint contains a substantial averment of plaintiff's ownership without setting forth the facts. *Barclay v. Quicksilver, etc. Co.* 6 Lans. 25; *Heine v.*

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Anderson, 2 Duer, 318. Where, in the complaint and upon the trial, plaintiff claims as sole owner, he must stand or fall upon that and cannot fall back upon an alleged lien. *Hudson v. Swan*, 83 N. Y. 552. Nor can a plaintiff so frame his complaint that if he fails to recover possession of the property he can recover damages for its conversion. *Scymour v. Van Curen*, 18 How. 94; *Maxwell v. Farnam*, 7 How. 236. The complaint should show a wrongful taking and that defendant took the property and unjustly detained it. *Childs v. Hart*, 7 Barb. 370; *Simser v. Cowan*, 56 Barb. 395; *Till v. Beyer*, 38 N. Y. 161. The usual form is to charge that defendant converted the property to his own use. *Decker v. Mathews*, 12 N. Y. 313. Such an averment is proper in case of wrongful taking or wrongful withholding. *Berney v. Drexel*, 63 How. 471. A lessor, suing under a clause in a lease of chattels giving him the right to possession if he deems himself unsafe, must so allege. *Hathaway v. Quimby*, 1 T. & C. 386.

A complaint in replevin to recover a thing exchanged on an allegation of fraud, inducing the exchange, is not demurrable because it avers a warranty of soundness. *Devlin v. Stahl*, 2 Civ. Pro. R. 222. In an action of replevin for property alleged to have been obtained by fraud of one defendant, and afterward transferred by him by a general assignment, for benefit of creditors, to the other defendants, *held*, that the allegation of transfer was not an admission of title in such defendant. *Rome v. McGovern*, 9 Daly, 60. Determining whether or not an action is replevin, the prayer for relief may be considered. *Thompson v. Strauss*, 29 Hun, 256; *Spaulding v. Spaulding*, 3 How. 297; *Dows v. Green*, 3 How. 377.

The nature of the action in replevin is to be ascertained by reference to the complaint. *Hoffman v. Markham*, 88 Hun, 18. Section 1721, so far as it requires that if the action is founded on the wrongful detention of the chattel, the plaintiff must state the facts showing such detention, only applies to the action of replevin, and not to an action of trover. *Barry v. Calder*, 48 Hun, 449. Where the complaint in an action to recover possession of personal property, contains no averment of a wrongful taking, but simply alleges wrongful detention, a general denial puts in issue both plaintiff's title and the wrongful detention, and under it defendant may show title in a stranger although he does not connect himself with the title. *Siedenbach v. Riley*, 111 N. Y.

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560, citing *Griffin v. Long Island R. R. Co.* 101 N. Y. 348, holding the same rule.

Where the complaint alleges that plaintiff was lawfully possessed of certain property, it sufficiently avers plaintiff's title. *Scifret v. Kraft*, 13 Civ. Pro. R. 321. In an action for wrongful detention it is necessary for plaintiff to show his title, which may be controverted under a general denial. *Griffin v. L. I. R. R. Co.* 101 N. Y. 348. A complaint which alleges that plaintiff is the owner and entitled to the possession of goods, that the sheriff has possession and wrongfully detains them, and that the ground of detention is that he is entitled to possession by virtue of process issued to him as sheriff, and also alleging that plaintiff demanded from the sheriff a return of the property, which was refused, sets forth facts sufficient to constitute a cause of action. *Summer v. Greenberg*, 9 Misc. 720, 60 St. Rep. 852, 29 Supp. 602.

Where a complaint alleged that plaintiffs had a special property in the property replevied, stating that it was a lien for unpaid purchase money, and the defendant's answer denied the allegation, no motion was made to make the complaint more definite and certain, and it appeared that defendants were not harmed by the omission, and the complaint set forth "the facts upon which the special property depends," as required by § 1720, it was held that the defect would not require the reversal of the judgment, and also that plaintiffs by alleging absolute ownership as well as a special interest did not waive their special interest, as the inconsistency between the two claims did not arise from the facts, but related wholly to the legal conclusions to be drawn from conceded facts. *Tuthill v. Skidmore*, 124 N. Y. 149.

A complaint which alleges property in plaintiff, possession by defendant as bailee, the value of the property and defendant's refusal to deliver the same on demand, states a cause of action. *Gregory v. Fichtner*, 14 Supp. 891, 38 St. Rep. 192, 21 Civ. Pro. R. 1, reversing 13 Supp. 593. A complaint alleging ownership in plaintiff of property of a specified value, that defendant wrongfully took possession thereof and wrongfully refuses to deliver it to plaintiff on demand, states a cause of action in replevin. The complaint need not allege that the action is not within any of the exceptions mentioned in § 1690, and where the taking was wrongful it is not necessary to allege detention of the property. *Hoffman v. Markham*, 88 Hun, 18, 34 Supp. 508, 68 St. Rep. 292.

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A complaint alleging plaintiff to be entitled to the immediate possession of property of plaintiff and that at a given date defendant being then in possession of the property unlawfully converted and disposed of the same to his own use and to plaintiff's damage, states a cause of action. It is not deficient on account of failure to allege demand and refusal, but an allegation of disposal of the property which involved the exercise of dominion over it, is sufficient, as such defendant was not entitled to exercise this right. *Saratoga Gas Co. v. Hazzard*, 55 Hun, 251; S. C. 27 St. Rep. 588, 7 Supp. 844, affirmed, 30 St. Rep. 1016.

The complaint in an action of replevin cannot be so framed that if plaintiff fails to recover possession of the property he can recover damages for its conversion. *Austin v. Waufol*, 36 St. Rep. 779, 13 Supp. 184. The Special Term has power, in its discretion, to allow an amendment to a complaint by making the cause of action one for conversion instead of replevin. *Goddard v. Cassell*, 84 Hun, 43, 31 Supp. 1044, 65 St. Rep. 74. But where the sureties on a bond for the return of goods, given by the sheriff in an action of replevin, who were in no way connected with the original taking, have been substituted as defendants in his stead, it is error to allow such an amendment of the complaint. *Roessel v. Rosenberg*, 10 Misc. 38, 30 Supp. 812. A complaint cannot be amended on the trial by changing the cause of action from replevin to conversion. Where the complaint alleges a wrongful taking of chattels while the evidence shows that they were obtained by false and fraudulent representations, there is a fatal variance. *Shufarman v. Jacobs*, 15 Misc. 10, 36 Supp. 428.

SUB. 2. THE ANSWER AND DEFENCES. § 1723, 1724, 1725.

§ 1723. Answer of title in third person.

The defendant may by answer defend, on the ground that a third person was entitled to the chattel, without connecting himself with the latter's title.

§ 1724. Answer that property was distrained doing damage.

Where the defence is, that a chattel, to recover which the action is brought, was distrained doing damage, an allegation that the defendant, or the person by whose command he acted, was then lawfully possessed of the real property, and that the chattel was distrained, while it was doing damage thereupon, is sufficient, without setting forth the title to the real property.

§ 1725. Defendant may demand judgment for return.

Where a chattel has been replevied and delivered to the plaintiff, or to a person not a party to the action, as prescribed in the foregoing sections of this arti-

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cle, the defendant's attorney may, within the time allowed to him for the service of a notice of trial, serve upon the plaintiff's attorney, a notice, that the defendant demands judgment for the return of the chattel, or for its value, either with or without damages for the detention thereof. Upon the trial, a copy of such a notice must be furnished to the court or referee, with a copy of the summons and of the pleadings.

The codifiers say as to § 1723: "This section settles a question which, when it was drafted, was doubtful, in accordance with *Ingraham v. Hammond*, 1 Hill, 353. *Contra, Rogers v. Arnold*, 12 Wend. 30. Since then the Court of Appeals has apparently ruled otherwise in *Stowell v. Otis*, 71 N. Y. 36. The latter case, so far as it conflicts with this section, will be of course superseded." Where an action to recover a chattel is based solely upon the wrongful detention, a general denial puts in issue, as well plaintiff's property in the chattel as the wrongful detention, and defendant, under such a plea, may show title in a stranger, although he does not connect himself with such title. Where an answer, after sufficiently admitting or denying certain allegations of the complaint, denies each and every allegation not herein admitted or denied, this is a good general denial. There is nothing in *Stowell v. Otis*, 71 N. Y. 36, in conflict with these views, but that case is an authority therefor. *Griffin v. L. I. R. R. Co.* 101 N. Y. 348, 9 Civ. Pro. R. 84, 1 St. Rep. 56. A general denial in defendant's answer to a complaint in replevin put in issue plaintiff's allegation of title. *Crane v. Crane*, 26 Week. Dig. 102.

If the answer is a general denial, and thus puts in issue plaintiff's title and the detention of the property, it is equivalent to a demand by defendant that the return of the property be adjudged to him, or the value of it, if delivery cannot be had; and as it thus appears that a demand by plaintiff would have been only an idle formality, proof of demand is not necessary. *Knapp v. Schneider*, 10 Daly, 218.

In replevin in the detinet, a general denial puts in issue the property and the right of possession. *Haas v. Altieri*, 21 Supp. 950, 2 Misc. 252. It is necessary for plaintiff to show his title, and defendant has a right to controvert it under a general denial by proof which may show not only title in himself, but title out of plaintiff and in a stranger. *Griffin v. Long Island R. R. Co.* 101 N. Y. 348, 9 Civ. Pro. R. 84, 1 St. Rep. 56. The value of the property is not the subject of an issue and should not be

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denied. *McKensie v. Farrell*, 4 Bosw. 192; *Connoss v. Meir*, 2 E. D. Smith, 314; *Hackett v. Richards*, 3 E. D. Smith, 13, reversed on other grounds, 13 N. Y. 138.

Although the value was alleged in the complaint and not denied, defendant may prove the true value. *Woodruff v. Cook*, 25 Barb. 505. But defendant cannot have damages unless they are claimed in the answer. *Whitcomb v. Hoffman*, 14 Hun, 335. Under an answer justifying seizure of property under a valid execution, and averring defendant's right to take, hold and sell the same under such process, defendant may show that the judgment on which it was issued was rendered on a demand for the purchase price of exempt property, although it was not so alleged in the answer. *Kraft v. Collins*, 13 Week. Dig. 189. Where the answer denied plaintiff's title, and alleged that the property was deposited by him with defendant to secure the payment of moneys loaned to him, which were still due; *held*, that no part of the answer could be stricken out as irrelevant. *Townsend v. Platt*, 3 Abb. 325. Part ownership of a chattel is a good defence to an action of replevin. *Hudson v. Swan*, 83 N. Y. 552, reversing 7 Abb. N. C. 324. Where the property has been taken from the defendant and delivered to the plaintiff, and judgment is finally entered in favor of the defendant, and a return of the property to him is directed, no damages for the taking and withholding of the property so seized can be recovered by him in such action unless a claim therefor has been set up in his answer. *Whitcomb v. Hoffman*, 14 Hun, 335. Section 1723 does not apply to an action in the District Court of the city of New York; such defences is not available therein. *Carswell v. Alden*, 12 Civ. Pro. R. 137, citing *Stowell v. Alden*, 71 N. Y. 36.

In *Klinger v. Bondy*, 36 Hun, 601, it is held that facts authorizing the defendant to attack the plaintiff's title as fraudulent, must be pleaded. It is not necessary for defendant to plead the Statute of Frauds in replevin in order to avail himself of it on the trial. *Van Dyke v. Clark*, 46 St. Rep. 455.

Where the answer set out the defendant was "entitled to possession of the chattels named in the complaint under and by virtue of a certain lease made and entered into whereby certain premises therein described were leased to defendant, together with certain machinery therein," *held*, that this averment was sufficiently definite and certain and that an order was properly made requir-

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ing the defendant to make its answer more definite and certain. *Durant v. East River Electric Light Co.* 15 Civ. Pro. R. 193.

Where the property has been delivered to plaintiff, an answer setting up a lien thereon and claiming damages for taking it, does not constitute a counterclaim. *De Leyer v. Michaels*, 5 Abb. 203. See *Brown v. Buckingham*, 21 How. 190, 11 Abb. 387. The rule that an answer of title in a stranger without an allegation connecting defendant with such title is no defence as laid down in *Stowell v. Otis*, 71 N. Y. 36; *Duncan v. Spear*, 11 Wend. 54; *Rogers v. Arnold*, 12 Wend. 30; *King v. Orser*, 4 Duer, 431; *Hoyt v. Van Alstyne*, 15 Barb. 568; and *Gerber v. Monie*, 56 Barb. 562, has been modified by § 1723 in actions for replevin. *Stonebridge v. Perkins*, 141 N. Y. 1.

Where a mortgagee under a chattel mortgage took possession of the chattels and the mortgagor subsequently made a general assignment, and thereafter the sheriff levied under an execution against the assignors, plaintiff was held entitled to recover, for the reason that if the whole mortgage was good the plaintiff acquired title thereto, and that if it were invalid, the title to the chattels passed to the assignee in the general assignment, and that in such case the sheriff, in order to justify his levy, must show a right in his judgment creditors to take a mortgaged chattel, and it was not sufficient to show that the party in whose possession the chattels were had no valid title thereto. *Guilford v. Mills*, 57 Hun, 493. Where the complaint in replevin does not aver a wrongful taking but alleges only a wrongful detention, a general denial puts in issue both plaintiff's title and the wrongful detention, and under it defendant may show title in a stranger although he does not connect himself with the title. *Siedenbach v. Riley*, 111 N. Y. 560.

Where it was claimed by defendant that plaintiff had no title, as prior to the giving of the bill of sale to her, her vendor had given a bill of sale of the same property to his wife, and it appeared that he retained possession, and that such bill of sale was not filed or delivered to the wife; *held*, the jury was authorized to find that the wife had no title or interest or right of possession as against plaintiff, although under § 1723 the defendant in an action of replevin may defend on the ground that a third person is entitled to the chattel without connecting himself with the latter's title. *Moussette v. Bacon*, 49 St. Rep. 455. Where

Art. 4. Affidavit, Undertaking and Requisition to Sheriff.

plaintiff's proof in an action for wrongful taking, showed both title to and possession of the property, defendants cannot defend by proving title in judgment debtors, nor can they raise any objection which they could waive, without alleging and proving facts which gave them the right to stand in the debtor's shoes and assail plaintiff's title. *Klinger v. Bondy*, 36 Hun, 601.

ARTICLE IV.

AFFIDAVIT, UNDERTAKING AND REQUISITION TO SHERIFF.

§§ 1694-1697, 1669, 1712,

SUB. 1. THE AFFIDAVIT. §§ 1695, 1696, 1697, 1712.

2. THE UNDERTAKING. § 1699.

3. REQUISITION. § 1694.

SUB. 1. THE AFFIDAVIT. §§ 1695, 1696, 1697, 1712.

§ 1695. Affidavit therefor, before commencement of action.

The affidavit, to be delivered to the sheriff, as prescribed in the last section, must particularly describe the chattel to be replevied; and must contain the following allegations:

1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof, by virtue of a special property therein; the facts with respect to which must be set forth.

2. That it is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to the best knowledge, information, and belief of the person making the affidavit.

4. That it has not been taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment, or fine, issued in pursuance of a statute of the State, or of the United States; or, if it has been taken under color of such a warrant, either that the taking was unlawful, by reason of defects in the process, or other causes specified, or that the detention is unlawful, by reason of facts specified, which have subsequently occurred.

5. That it has not been seized by virtue of an execution or warrant of attachment against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattel, since the seizure thereof; or, if it has been so seized, that it was exempt from the seizure, by reason of facts specified, or that its detention is unlawful, by reason of facts specified which have subsequently occurred.

6. Its actual value.

§ 1696. *Id.*; after commencement of action.

But where the affidavit is made after the service of the summons, the allegations, required to be inserted therein by subdivisions first and second of the last section, must be to the effect that the plaintiff, at the time of the commencement of the action, was the owner of the chattel, or was entitled to the possession thereof by virtue of a special property therein; and that it was then wrongfully detained by the defendant, as prescribed in those subdivisions.

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§ 1697. Id.; where several chattels are to be replevied.

Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity. Where it describes two or more chattels to be replevied, it may, at the election of the plaintiff, state the aggregate value of all; or, separately, the value of any chattel or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels or classes of chattels, the defendant may require, as prescribed in the following provisions of this article, the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of the portion thereof which has been replevied. If he procures such a return, the remainder must be delivered to the plaintiff, except as is otherwise prescribed in this article.

§ 1712. When agent, etc., may make affidavit for replevin or return.

The affidavit, to be delivered to the sheriff in behalf of the plaintiff, with a requisition to replevy a chattel, may be made by the plaintiff's agent or attorney, if the material facts are within his personal knowledge; or, if the plaintiff is not within the county where the attorney resides, or has his office, or is not capable of making the affidavit, The affidavit, to be delivered to the sheriff, either in behalf of the defendant, with a notice that he requires the return of the chattel, or in behalf of a person, not a party, who makes a claim as prescribed in section 1709 of this act, may be made by an agent or attorney, if the material facts are within his personal knowledge, or if the defendant or claimant, as the case may be, is not within the county where the property was replevied, and capable of making the affidavit. When the affidavit is made by an attorney or agent, he must state therein what allegations, if any, are made upon his information and belief; and he must set forth therein the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why the affidavit is not made by the party or the claimant.

The affidavit must particularly describe the property. *Talcott v. Belding*, 36 Super. Ct. 84; *Dewitt v. Morris*, 13 Wend. 497. But if the affidavit is defective a supplemental affidavit may be allowed or amendment granted. *Depew v. Leal*, 2 Abb. 131; *Spaulding v. Spaulding*, 3 How. 297; *Dows v. Green*, 3 How. 377. Where plaintiff is the owner an allegation of that fact is sufficient. *Vandenburgh v. Van Valkenburgh*, 8 How. 217. But if he has a special property in the goods the facts should be stated. *Depew v. Leal*, 2 Abb. 131, *supra*. Where plaintiff's affidavit alleged she was entitled to possession of chattels by virtue of a special property in said chattels, to wit, as sole legatee of a decedent, and that such decedent died seized of the property, which formerly was in possession of his executor, who had absconded, *held*, that the affidavit was defective and contained no facts showing a special property, no delivery by the executor being shown. *Donald v. Rockwell*, 19 Week. Dig. 192. Where property has been seized

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under an execution the affidavit must show that it is exempt from such seizure by statute. *Spaulding v. Spaulding*, 3 How. 297. An allegation may be made in the affidavit that defendant detains the property, even if it has passed out of his possession. *Ross v. Cassidy*, 27 How. 416; *Brockway v. Burnap*, 16 Barb. 309; *Nichols v. Michael*, 23 N. Y. 264.

The proceedings may be set aside on motion where the affidavit is insufficient. *Americus Tool Co. v. Smith*, 32 Hun, 122; *O'Reilly v. Good*, 18 Abb. 106; *Stockwell v. Veitch*, 38 Barb. 650; or untrue; *Niagara Elevated Co. v. McNamara*, 2 Hun, 416. A general appearance in the action waives any irregularity in the affidavit, as does giving an undertaking for a re-delivery of the property. *Hyde v. Patterson*, 1 Abb. 248; *Wisconsin M. & F. Ins. Co. v. Hobbs*, 22 How. 494. But where the affidavit upon which a requisition in replevin is based contained an allegation of a demand of the property, but was in fact verified before the demand was made, *held*, an irregularity which was not waived by an appearance in the action, but was amendable upon proper terms. *McAdam v. Walbran*, 8 Civ. Pro. R. 451. A portion of subdivision 4 of § 1695 is new, authorizing statement as to invalidity of process, and was added by the codifiers in accordance with the interpretation of the statute in *People v. Albany Common Pleas*, 7 Wend. 485; *Wright v. Briggs*, 2 Hill, 77; *Stockwell v. Veitch*, 38 Barb. 650; *Hudler v. Golden*, 36 N. Y. 456.

An affidavit which does not state any facts showing that the taking of the property was unlawful by reason of any defects in the process or by reason of facts which it subsequently incurred, states a mere legal conclusion. *Norris v. Jones*, 7 Misc. 198, citing *Emery v. Baltz*, 94 N. Y. 408; *Talcott v. City of Buffalo*, 125 N. Y. 280. If the affidavit is irregular and not complying with § 1695, an objection on that ground should be taken promptly and the notice of motion should specify the irregularity complained of. It is too late after defendant's time to answer has expired. *Paddock v. Guyder*, 29 St. Rep. 773, 8 Supp. 905.

Motion is the proper remedy to set aside replevin papers for defects in the affidavit, but unless promptly made plaintiff will be allowed to file by way of amendment the affidavit used upon the motion to set aside. *Ethridge v. Orcutt*, 12 St. Rep. 372. An affidavit stating that plaintiff is the owner and entitled to the possession of all the dry goods, etc., of a certain firm in a certain

 Art. 4. Affidavit, Undertaking and Requisition to Sheriff.

building and that they are wrongfully detained from him, sufficiently describes the property to be taken, as it will be held to cover property formerly owned by the firm and still held and claimed by it. *McCarthy v. Ockerman*, 92 Hun, 19, 37 N. Y. Supp. 914, 73 St. Rep. 42.

Affidavit in Replevin.

SUPREME COURT.

PETER MASTEN AND WILLIAM M. HAYES	}
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agst.

WILLIAM WEBB.	}
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ULSTER COUNTY, ss. :

William M. Hayes, of said county, being duly sworn, says he is one of the firm of Masten & Hayes, and one of the above plaintiffs; that the firm of Masten & Hayes, composed of the above-named plaintiffs, are the owners and entitled to the immediate possession of the following described chattels, under and by virtue of a bill of sale duly executed by one C. J. Townsend to Peter Masten and William M. Hayes, composing the said firm of Masten & Hayes; and that said plaintiffs claim possession of the following chattels as aforesaid (Here insert the chattels claimed and their value); that said chattels are wrongfully claimed and detained by William Webb, sheriff of Ulster county, the defendant above-named; that the alleged cause of detention thereof, according to this deponent's best knowledge, information and belief, is as follows: That said defendant claims the right to the possession of said chattels under and by virtue of an execution issued out of the Supreme Court, in an action entitled *George Davis v. C. J. Townsend*, and levy made under said execution; that said chattels have not been taken by virtue of a warrant against the plaintiff for the collection of a tax, assessment or fine issued in pursuance of a statute of the State or of the United States; that said chattels have not been seized by virtue of an execution or warrant of attachment against the property of the plaintiff, or of any other person from or through whom the plaintiff has derived title to said chattels, or any part thereof, since the seizure thereof; that the actual value of each of said chattels is as above stated, amounting in the aggregate to \$400; that the said plaintiff has commenced, by the issue of a summons, a copy of which is hereto annexed, an action in this court against said William Webb for the recovery of the possession of said chattels; that said summons has been served and no answer has been served by said defendant, and his time to answer has not yet expired.

(Jurat.)

WILLIAM M. HAYES.

Art. 4. Affidavit, Undertaking and Requisition to Sheriff.

SUB. 2. THE UNDERTAKING. § 1699.

§ 1699. Plaintiff's undertaking for replevin.

The undertaking to be delivered to the sheriff, with a requisition to replevy a chattel, must be executed by at least two sureties, who must be approved by the sheriff. It must be to the effect that the sureties are bound in a specific sum, not less than twice the value of the chattel, as stated in the affidavit, for the prosecution of the action; for the return of the chattel to the defendant, if possession thereof is adjudged to him, or if the action abates, or is discontinued, before the chattel is returned to the defendants; and for the payment to the defendant of any sum which the judgment awards to him against the plaintiff.

No consideration is necessary to support an undertaking beside the claim to the property, nor is it necessary that the undertaking should express a consideration. *Harrison v. Utley*, 6 Hun, 565. It is not in the power of the sheriff to dispense with the undertaking. *Wilson v. Williams*, 18 Wend. 581. Nor can he arbitrarily refuse his approval to an undertaking although it is an act for his own protection. *Nosser v. Corwin*, 36 How. 540. The bond is as essential as the affidavit. *Smith v. McFall*, 18 Wend. 521; *Wilson v. Williams*, 18 Wend. 581; *Whaling v. Shales*, 20 Wend. 673. An error in an undertaking as to date does not vitiate it; *Hyde v. Patterson*, 1 Abb. 248; and a defect may be cured upon exception. *Wilson v. Williams*, 18 Wend. 581; *De Requie v. Lewis*, 3 Robt. 708.

A new undertaking may be given *nunc pro tunc* by order of the court. *Cutler v. Rathbone*, 1 Hill, 204; *Conklin v. Dutcher*, 5 How. 386; *Harrington v. American, etc. Co.* 1 Barb. 244; *Decker v. Judson*, 16 N. Y. 439. The undertaking includes costs on appeal to the General Term and Court of Appeals. *Tibbles v. O'Connor*, 28 Barb. 538. And where it is given by a non-resident plaintiff, no security for costs will be required. *Wisconsin, etc. Ins. Co. v. Hobbs*, 22 How. 494. Defendants are not estopped from raising questions as to the invalidity of the undertaking by the fact that they had not raised them in the answer where they appeared upon the face of the complaint. *Mittnacht v. Kellermann*, 105 N. Y. 461. It seems after the chattel has been delivered, and the undertaking approved, the court has no power to require a new undertaking on account of the insolvency of the sureties. *Ludwig v. Dunsceith*, 2 Law Bull. 97.

Where the plaintiff has caused the sheriff to replevy a chattel the court cannot require him to give a larger undertaking in place of

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the one given to secure such replevy on the ground that the real value of the chattel is greater than stated in the plaintiff's affidavit. The authority of the court must be looked for in the statute, and if it does not exist, it cannot be exercised. Requisition of a plaintiff is deemed the mandate of the court, but it is not ordered by the court and is not discretionary. A court has no control over its issuance or over the subsequent proceedings except to vacate for irregularities and to see that the statute provisions are duly executed. *U. S. Land & Investment Co. v. Bussey*, 53 Hun, 516; s. c. 17 Civ. Pro. R. 164.

In an action against sureties on an undertaking it appeared defendant had not required the return of the property to him, but in his sworn answer alleged that the sheriff had the custody of the property by virtue of the levy of an execution, whereupon plaintiff discontinued his action and judgment of dismissal was entered; *held*, no breach of the undertaking given by plaintiff, since the discontinuance before the return of the property is a determination of the action in response to the requirement of defendant for a return or in pursuance of a judgment awarding him possession. *Bowen v. Weppner*, 62 Hun, 579, 43 St. Rep. 702, 17 Supp. 193.

Where an undertaking on appeal from the judgment in replevin to the General Term, instead of being in the form of an undertaking to stay proceedings on appeal in such an action under § 1329, was in the form prescribed by § 1327 to stay execution of a money judgment, and was treated as proper and effectual to stay proceedings, it was held that as no undertaking was requisite upon the appeal except to stay the proceedings, the giving of it was an idle ceremony, unless it was intended to secure that object, that it was founded on a good consideration and was a good common law agreement, enforceable according to its terms. The judgment in a replevin suit was against three defendants; it was affirmed as to two and a new trial ordered as to the third, and on such new trial a judgment was found in his favor; *held*, that it did not discharge the sureties. *Goodwin v. Bunzl*, 102 N. Y. 224.

The defendant who has furnished an undertaking for a return of the property and admits that it has all been taken by the answer, cannot contradict such recitals on the trial by showing only a portion of the property ever came into his possession even though he did not personally execute such undertaking. It seems

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that if the defendant desires to raise the question of identity of the goods replevied with those claimed by plaintiff, he should raise it not by admitting it in the bond and subsequently contradicting such admission, but he might sue the sheriff for the taking or leave the property in his hands, try the case and, if successful, property would be returned or its value insured to him; subsequently putting in an answer denying the identity of the goods taken with those described in the requisition will not relieve him from the estoppel created by the delivery of the undertaking. *Martin v. Gilbert*, 119 N. Y. 298, 29 St. Rep. 440, 30 St. Rep. 929.

It was held, in *Nowell v. Gilbert*, 49 Hun, 489, citing *Diossy v. Morgan*, 74 N. Y. 11; *Harrison v. Wilkin*, 69 N. Y. 412, and *Decker v. Judson*, 16 N. Y. 439, that such a recital estopped defendant from denying his previous possession of the property replevied, but that it did not conclusively estop him from showing that the property replevied did not embrace all that was mentioned in the affidavit but only so much as he procured the return of thereby, and that if the recital in the undertaking was broad enough to import that all the property was taken, it could at most be regarded as mere evidence and not an estoppel as to property which he did not procure the return of.

Undertaking in Replevin.

PETER MASTEN AND WILLIAM M. HAYES	}
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agst.

WILLIAM WEBB.	}
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Whereas, affidavit has been made by William M. Hayes, one of the plaintiffs in this action, that the defendant therein wrongfully detains certain chattels in the said affidavit mentioned, of the value of \$400, and the plaintiffs claim the immediate delivery of such chattels to him: Now, therefore, in consideration of the taking of said property, or any part thereof, by the coroner of the county of Ulster, and the requisition thereupon indorsed, we, the undersigned, E. D. Tenyck of Kingston, Ulster county, New York, an undertaker, and Edward Every, of said city, a broker, do hereby jointly and severally undertake and become bound to the defendant in the sum of \$800 for the prosecution of the said action for the return of the said

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chattels to the said defendant, if possession thereof is adjudged to him, or if said action abates or is discontinued before said chattels are returned to the defendant, and for the payment to the defendant of any sum which the judgment awards to him against the plaintiff.
(Signatures.)

Approval of Undertaking by Coroner.

I approve of the within undertaking as to its form and the sufficiency of the sureties thereto.

(Date.)

ALBERT CARR,
Coroner of County of Ulster.

SUB. 3. REQUISITION. § 1694.

§ 1694. Plaintiff may require sheriff to replevy.

The plaintiff may, when the summons is issued, or at any time afterwards, and before the service of a copy of the defendant's answer, or, where judgment is taken by default for want of an appearance or pleading, before the entry of the final judgment, cause the chattel, to recover which the action is brought, to be replevied by the sheriff of the county where it is found. For that purpose he must deliver to the sheriff an affidavit and a written undertaking, as prescribed in the following sections of this article, with a written requisition, indorsed upon or annexed to the affidavit, and subscribed by his attorney, to the effect, that the sheriff is required to replevy the chattel described therein. The requisition may be directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the chattel is found. It is deemed the mandate of the court.

The requisition is both the foundation and boundary of the sheriff's duty and power; if valid on its face, he is bound to execute it, and he has no right to look beyond it or behind it. *Second National Bank v. Dunn*, 63 How. 434. A requisition to the sheriff in replevin authorizes the taking of the chattel specified from the defendant named in the action or his agent. *Hopkins v. Davidson*, 52 Supr. 529; *Otis v. Williams*, 70 N. Y. 208. It is held in *Guyon v. Rooney*, 28 St. Rep. 624, that in Justices' Court, under § 2933, an action to recover a chattel may be maintained although there has been no requisition. Citing S. C., 25 St. Rep. 326.

A sheriff should not be compelled to execute a requisition of replevin and to take into his possession property which is in the possession of persons who are not parties to the action, nor to the motion to compel such action on his part, and who are not shown to be the agents of defendant or in any wise connected with him. *Lehman v. Mayer*, 8 App. Div. 311.

Art. 5. Duty of Sheriff.

Form for Requisition in Replevin.

(Title)

To any Coroner of the County of Ulster :

I hereby require you to take the chattels mentioned in the within affidavit from the defendant and deliver the same to the plaintiff in this action.

(Date.)

R. BERNARD,
Plaintiff's Attorney.

ARTICLE V.

DUTY OF SHERIFF. §§ 1698, 1700-1702, 1706-1708, 1715, 1716.

SUB. 1. HOW CHATTEL TO BE REPLEVIED AND KEPT. §§ 1698, 1700, 1701, 1702.

2. DELIVERY OF CHATTEL BY SHERIFF. §§ 1706, 1707, 1708.

3. SHERIFF TO MAKE RETURN. §§ 1715, 1716.

SUB. 1. HOW CHATTEL TO BE REPLEVIED AND KEPT. §§ 1698,
1700, 1701, 1702.

§ 1698. Provision where a part only is replevied.

The sheriff must replevy a smaller number or a smaller quantity, if the whole of the chattel or chattels described in the affidavit cannot be found. In that case, if the aggregate value only is stated in the affidavit, the value of the entire chattel or class of chattels, as so stated, is to be deemed the value of the part replevied, for the purposes of the proceedings to procure a return thereof to the defendant.

§ 1700. How chattel to be replevied.

If any chattel, described in the affidavit, is found in the possession of the defendant, or of his agent, the sheriff, to whom an affidavit, requisition, and undertaking are delivered, as prescribed in the foregoing sections of this article, must forthwith replevy it by taking it into his possession. He must thereupon, without delay, serve on the defendant a copy of the affidavit, requisition and undertaking, by delivering the same to him personally, if he can be found within the county; or, if he cannot be so found, to his agent, if any, from whose possession the chattel is taken; or, if neither can be found within the county, by leaving the copy at the usual place of abode of either, with a person of suitable age and discretion.

§ 1701. Id.; how taken from a building, etc.

If any chattel, described in the affidavit, is secured or concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it is not delivered, pursuant to the demand, he must cause the building or inclosure to be broken open and must take the chattel into his possession.

§ 1702. Replevied chattel; how kept, etc.

A sheriff, who has replevied a chattel, must retain it in his possession, keeping it in a secure place until the person who is entitled to the possession thereof is ascertained, as prescribed in this article. He must then deliver it to that person upon request and payment of his lawful fees, and necessary expenses

Art. 5. Duty of Sheriff.

for taking and keeping it, as taxed by a judge of the court, or the county judge of the county where the chattel was replevied upon such a notice as the judge deems proper.

Where the property described in the complaint is taken by the sheriff or his agent, the sheriff is not liable for trespass, and no action lies against him. *Foster v. Pettibone*, 20 Barb. 350; *Shipman v. Clark*, 4 Den. 446. A coroner is protected if he takes the property from the person named. *Manning v. Keenan*, 73 N. Y. 45. In an action against a sheriff for seizing property belonging to one against whom he had an execution, under which he seized it, he may give any pertinent evidence showing the transfer, under which plaintiff claimed, to be void. *Raymond v. Richmond*, 78 N. Y. 351. An action lies where the sheriff takes property of a third person from the actual owner, even though he takes the specific articles. *Stimpson v. Reynolds*, 14 Barb. 506; *King v. Orser*, 4 Duer, 431; *Hess v. Sprague*, 13 Week. Dig. 164; *Deutsch v. Reilly*, 8 Daly, 132. A requisition to a sheriff, in an action of replevin, only authorizes the taking of the property specified from the defendant named in the action, or his agent. It is no protection when he takes them from another in an action of trespass brought by the latter. The fact that the owner is a married woman, and the defendant is her husband and agent, does not affect the legal status of such owner; nor does the fact that, in the replevin suit, the defendant sets up title and possession in his wife and succeeds on that issue; the wife is not bound by the judgment therein. *Otis v. Williams*, 70 N. Y. 208. But, where the actual possession of the property remains in the defendant, although there has been a transfer of title and a constructive change of possession, the process is a protection. *Bullis v. Montgomery*, 50 N. Y. 353. Both these cases are cited and followed in *Hess v. Sprague*, 13 Week. Dig. 164, and *Sheffield v. Clark*, 12 Week. Dig. 226; same principle, *Hopkins v. Davidson*, 52 Super. Ct. 529.

It was held, under former Code, that where goods were replevied, a third person, after making due demand, might bring an action against the officer executing the requisition for a detention of the goods. The officer's process is not a bar to such an action, and the only demand necessary is service of affidavit and notice of claim. *Manning v. Keenan*, 73 N. Y. 45. To render the sheriff liable there must be a judgment under the execution on which the property might be sought and delivered, and a judg-

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ment for value is not such. *Gallarate v. Orser*, 27 N. Y. 324. A requisition in proceedings against a purchaser at a wrongful sale justifies the sheriff in taking the property, although the sheriff was merely the agent in the purchase, if the papers are served and the seizure made while the goods are in his actual possession. *Haskins v. Kelly*, 1 Abb. (N.S.) 63. The sheriff has no right to look beyond or behind the replevin process. He is required to obey the command of the court and will be protected if he does so. *Second Nat. Bank v. Dunn*, 2 Civ. Pro. R. 259, reversed on other grounds, 4 Civ. Pro. R. 378. As to liability of sheriff for property, see *White v. Madison*, 26 N. Y. 117; *Moore v. Westervelt*, 27 N. Y. 234; *Schuyler v. Hargous*, 28 How. 245.

In an action for damages for the conversion of personal property, defendant answered, by way of justification, that he was a constable and took the property by virtue of the requisition issued in an action brought in a justice's court, and founded upon the requisite affidavit and undertaking, to recover possession thereof. The property was in the dwelling-house of plaintiff, into which, in the absence of the latter, the constable made forcible entry and took the goods from the house; held that the constable was vested with the same power as the sheriff, who is required, in case any chattel described in the affidavit in such proceedings, is secured or concealed in a building or inclosure, to publicly demand its delivery, and if delivery is not made pursuant to the demand, to cause the building or inclosure to be broken open and to take the chattel into his possession. The constable in this case upon a first visit to the house where the property was, learning that plaintiff was away, left, and afterwards returning, "rapped and halloed Wilson;" finding the door fastened, he then took an ax and pried off the window-casing, thus obtaining an entry to the house. It appeared that no person was in the house when the constable went there and proceeded thus to execute the process; *held*, that he had done all that was requisite to justify his making a forcible entry; that the demand referred to in the statute might be made at the building, and need not be made elsewhere, and that the absence of the occupants from the building did not preclude the officer from making an entry; that, under the circumstances, it would have been a useless ceremony to read aloud the list of articles which the constable was seeking to replevy and formally to make a demand for the delivery thereof; that

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the right of an officer to forcibly enter a building in order to replevy property, existed at common law and was not derived from the statute. *Howe v. Oyer*, 50 Hun, 559, 20 St. Rep. 685, 3 Supp. 726.

Where the property is damaged through the sheriff's negligence, plaintiff does not release the sheriff from liability by receiving it in its damaged condition, but the sheriff is not required to use more than ordinary diligence in taking care of it. *Moore v. Westervelt*, 21 N. Y. 103, reversing 1 Bosw. 357.

Where plaintiff began replevin against defendant, a stable keeper, and recovered possession of a horse—the sheriff having replevied the same, left it temporarily in defendant's stable, and thereupon on the next day, defendant, with the intention of acquiring a lien on the horse, served a notice of such lien under the statute, it was held that the service of such a notice after the action was commenced, though the horse was still in defendant's stable, was a nullity and no defence to the action. *Bentley v. Colyer*, 9 St. Rep. 687.

When the sheriff takes possession of property in replevin, it passes into the custody of the law and defendant's detention, considered as a wrong is ended. *Commerce Exchange Nat. Bank v. Blye*, 123 N. Y. 132.

SUB. 2. DELIVERY OF CHATTEL BY SHERIFF. §§ 1706, 1707, 1708.

§ 1706. When and to whom sheriff must deliver chattel.

If the defendant neither excepts to the plaintiff's sureties, nor requires the return of the chattel, within the time prescribed for that purpose; or if he makes default in serving notice of the justification of his sureties, or in procuring the allowance of his undertaking; or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking; the sheriff must, except in the case specified in section 1709 of this act, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, makes default in serving notice of justification, or in procuring the allowance of his undertaking; or if the defendant, after he has required the return of the chattel, duly procures the allowance of his undertaking; the sheriff must immediately deliver the chattel to the defendant. When the chattel is delivered by the sheriff to either party, as prescribed in this section, the sheriff ceases to be responsible for the sufficiency of the sureties of either party; until then he is responsible for the sufficiency of the sureties of the plaintiff or of the defendant, as the case may be.

§ 1707. Penalty for wrong delivery by sheriff.

A sheriff, who delivers to either party, without the consent of the other, a chattel replevied by him, except as prescribed in the last section, or by virtue of an execution issued upon a judgment in the action, forfeits, to the party

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aggrieved, two hundred and fifty dollars; and is also liable to him for all damages which he sustains thereby.

§ 1708. Undertaking; to whom delivered.

Where the sheriff duly delivers a chattel to either party, as prescribed in the last section but one, he must, at the same time, deliver to the adverse party the undertaking received by him from the party to whom the chattel is delivered, together with the examination of the sureties, and the judge's allowance, if any.

During the three days sheriff must retain possession. If defendant elects to demand a return, sheriff must still retain possession until defendant's sureties justify, unless the sheriff is willing to take the risk of such justification. The effect of defendant's demand of the property, within three days, is not to entitle defendant to the property, but to prevent a delivery to the plaintiff. *Graham v. Wells*, 18 How. 376. The right of the defendant to the delivery of the property to him is dependent upon the justification of his sureties upon notice. *Grant v. Booth*, 21 How. 354. After delivery, to plaintiff, of the goods, there seems to be no provision for new sureties in case of insolvency; *Ludewig v. Dunscith*, 2 Law Bull. 97; nor any provision for the restitution of property to plaintiff after its delivery to defendant. The court will only interfere to protect the property from injury. *Hunt v. Mootry*, 10 How. 478. But ample provision is made for the amendment of an undertaking to retake chattels in furtherance of justice, and the defendant, in an action of replevin, may complete an undertaking to retake chattels replevied by the justification of the sureties therein, after judgment against him, where notice of justification was given before judgment, and the proceedings on the judgment are stayed and an appeal taken therefrom. *Corn Exchange Bank v. Blye*, 9 Civ. Pro. R. 412. A motion to set aside the proceedings by reason of defective papers is proper. The motion must be made promptly and will be denied if not made until after the expiration of the three days during which the property may be reclaimed, or exception taken to sureties, and after the property has passed beyond the control of plaintiff. *Etheridge v. Orcutt*, 12 State Rep. 372.

It seems that if the affidavit of the plaintiff to replevy several articles states only an aggregate value and the sheriff seizes only part of the goods, defendant may tender the undertaking to procure a return for a proportionate sum of the whole amount. *Webber v. Manne*, 105 N. Y. 627.

Art. 6. Proceedings by Defendant.

If the sureties on an undertaking to return replevied property to defendant, fail to justify, the sheriff must deliver the chattel to plaintiff and an undertaking to obtain a return of the chattel to defendant does not become operative, and no liability is incurred thereon until the justification and allowance of the sureties. *O'Connell v. Kelly*, 8 Supp. 475.

SUB. 3. SHERIFF TO MAKE RETURN. §§ 1715, 1716.

§ 1715. Return, etc., by sheriff.

The sheriff must, within twenty days after he has delivered a chattel replevied by him, to the party entitled to the possession thereof, or to a third person, as prescribed in this article, file with the clerk the plaintiff's affidavit, and the accompanying requisition, with a return, stating in what manner he has executed the latter. If he has omitted to replevy a part of the chattel, or of two or more chattels, described in the affidavit, the return must state the cause of the omission.

§ 1716. Id. ; how compelled.

If the sheriff fails to comply with the last section, either party may require him so to do, within ten days after service of a notice to that effect, or to show cause, at a term of the court designated in the notice, why he should not be punished for a contempt of the court. The notice may be served at any time before final judgment, except that it cannot be served on the part of the defendant, before answer. An omission to comply with such a notice is punishable as a contempt of the court.

While a judge of the court in which an action of replevin is pending, or a county judge of the county, has power to award to a sheriff compensation for his trouble and expense in taking and keeping the property replevied by him, and while the manner in which such compensation is to be ascertained rests in the discretion of the judge, his determination must be sustained by some legal proof. No power is given him to dispense with all proof and fix an arbitrary sum or to act upon his own judgment. *Nestor v. Bischoff*, 123 N. Y. 517.

ARTICLE VI.

PROCEEDINGS BY DEFENDANT. §§ 1703, 1704, 1705.

§ 1703. When defendant may except to sureties; proceedings thereupon.

Within three days after the chattel is replevied, and a copy of the affidavit, requisition, and undertaking is served, the defendant, unless he requires a return of the chattel replevied, or of one or more of them, where two or more chattels are replevied, may serve upon the sheriff a notice, that he excepts to the plaintiff's sureties; otherwise he is deemed to have waived all objections to them.

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Where the defendant has not appeared, the notice must be subscribed either by him, or by his agent or attorney. The person so subscribing the notice must add to his signature his office address, as prescribed by law, with respect to a notice of appearance. Within ten days after service of such a notice, the plaintiff's attorney must serve upon defendant's attorney, or, if the defendant has not appeared, upon the sheriff, notice of the justification of the sureties. If the notice of justification is served upon the sheriff, he must immediately serve it upon the person, whose name is subscribed to the notice of exception, in the mode prescribed by law, for service of a paper upon an attorney in an action.

§ 1704. When defendant may reclaim chattel; proceedings thereupon.

The defendant, if he does not except to the plaintiff's sureties, as prescribed in the last section, may, within the time allowed to him for such an exception, serve upon the sheriff, a notice that he requires a return of the chattel replevied. With the notice, he must deliver to the sheriff the following papers:

1. An affidavit, containing an allegation, either that the defendant is the owner of the chattel, or that he is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts with respect to which must be set forth.

2. An undertaking, executed by at least two sureties, to the effect that they are bound, in a specified sum, not less than twice the value of the chattel as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if delivery thereof is adjudged, or if the action abates in consequence of the defendant's death; and for the payment to him of any sum, which the judgment awards against the defendant.

Within three days after serving a notice, requiring a return of the chattel, as prescribed in this section, the defendant must serve upon the plaintiff's attorney, notice of the justification of the sureties to the undertaking.

§ 1705. Sureties; when and how to justify.

The justification of sureties, as prescribed in either of the last two sections, must take place, either in the county where the chattel was replevied, or in the county where one of the sureties resides. The provisions, regulating the justification of bail, contained in article third of title first of chapter seventh of this act, govern, except as otherwise expressly prescribed in his article, with respect to the notice of justification of the sureties; the officer before whom they must justify; the substitution of new sureties or a new undertaking; the examination and qualifications of the sureties; and the allowance of the undertaking. But after the allowance, the undertaking and examination must be delivered to the sheriff.

Where a defendant desires to reclaim chattels replevied, he must serve upon the sheriff written notice that he requires the return thereof, and must file an affidavit, either that he is the owner of the property, or that he is entitled to the possession thereof. These conditions are mandatory, and failure to comply with them by defendant renders his counter bond nugatory. *Teschner v. Deverson*, 59 How. 467. An undertaking under this section is not invalid because taken in the name of plaintiff. *Slack v. Heath*,

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1 Abb. 331. See *Decker v. Judson*, 16 N. Y. 439. Giving a return bond does not admit a cause of action or estop defendant from denying demand. *Church v. Frost*, 3 T. & C. 318. But if defendant excepts to plaintiff's sureties he waives the right to the return of the property. *Cullen v. Miller*, 5 Abb. N. C. 282; *Hofheimer v. Campbell*, 59 N. Y. 269. Query, whether these authorities are affected by § 1706. Where defendant gives an undertaking which states that he requests a return of the property, it is competent evidence to disprove an allegation in the answer that defendant does not detain the property. *Black v. Foster*, 28 Barb. 387. Where defendants have put themselves on their claims of right, and procured a restoration of the property, no subsequent offer to return it, unaccompanied with an offer to submit to a judgment in favor of plaintiffs for the possession, can be of any avail. *Brewster v. Silliman*, 38 N. Y. 423. When a defendant gives a bond and retakes possession, he is estopped from denying that he had possession. *Diossy v. Morgan*, 74 N. Y. 11. Where, in an action to recover the value of chattels, the affidavit stated only their aggregate value, and the sheriff replevied only a part of them, *held*, that the undertaking of the defendant should be for the return of the articles replevied. The plaintiff cannot, by stating the aggregate value, compel the defendant to give an undertaking for the return of all the chattels where only part have been replevied by the sheriff. *Weber v. Manne*, 3 State Rep. 177, affirmed, 4 State Rep. 497; s. c. 42 Hun, 557 (see 105 N. Y. 627, no opinion), holding further that under § 1698, where the value of separate articles has not been stated in the affidavit, but a gross value placed on the whole, the entire value is to be deemed that of the part replevied, in proceedings to procure a return thereof by defendant; *held*, further, that the recital in the undertaking that only part of the chattels had been replevied, was not a material error, for whatever amount was replevied by the sheriff, the persons executing the undertaking would be liable to plaintiff in the event of his success in the action, and that this was the extent of their liability in any case. Where defendants' sureties failed to justify because of a stay of proceedings granted on an order to show cause why the undertaking should not be set aside, the stay becomes vacated when the motion is denied, and the defect, in justifying, may then be corrected. *Corn Exchange Bank v. Blye*, 2 Civ. Pro. R. 8. If the defendants except to the

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plaintiffs' sureties in the replevin bond, and they fail to justify, he is not entitled to an order for the delivery of the property before judgment. *Miller v. Miller*, 5 Abb. N. C. 332.

In *Clark v. Hooper*, 69 Hun, 445, which arose on an undertaking given in justices' court, it was held that the undertaking required was similar in all respects to that required by § 1704, and it is held that such an undertaking need not have sub-joined to it at the time it is filed an affidavit of justification of sureties. S. C. 52 St. Rep. 632.

A bond for the return of chattels which does not recite that the chattels mentioned in plaintiff's affidavit were taken, but that other property was, and conditioned for the return of the chattels mentioned in the affidavit, is void and of no effect. *Klinkowstein v. Greenberg*, 15 Misc. 479, 37 N. Y. Supp. 206, 72 St. Rep. 785.

One of the sureties on an undertaking for the return of property cannot be permitted to withdraw after its approval, except upon notice to the defendant and co-surety and with consent of the plaintiff. *Quarch v. Metz*, 15 Misc. 622, 37 N. Y. Supp. 218, 72 St. Rep. 797.

Where sureties have been substituted as defendants in place of the sheriff, a motion to amend the complaint by changing the cause of action from replevin to conversion will be denied. *Steel v. Rosenberg*, 24 Civ. Pro. 340, distinguishing *Dyett v. Hyman*, 129 N. Y. 351, which held that the provisions giving indemnitors the right to be substituted as defendants in place of the sheriff, do not have the effect to limit the liability of the indemnitors to the amount they would be liable in an action by the sheriff upon their bond, and in no way affect or vary the rights of the injured party.

Under § 1704, the allegations of the affidavit of the defendant as to a third person claiming the property may be made on information and belief. *Lang v. Levi*, 32 St. Rep. 418.

Defendant's Affidavit to Reclaim Chattels.

<p>PETER MASTEN AND WILLIAM M. HAYES agst. WILLIAM WEBB.</p>
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ULSTER COUNTY, ss. :

William Webb, of said county, being duly sworn, says he is the defendant in the above-entitled action; that on the 11th day of July,

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1894, the chattels mentioned in the annexed notice were replevied herein and a copy of the affidavit, requisition and undertaking served upon said defendant; that the defendant does not except to the plaintiff's sureties herein; that the deponent is lawfully entitled to the possession of the chattels replevied herein, by virtue of an execution held by him against one Cornelius J. Townsend, for the sum of \$800; that Cornelius J. Townsend is the owner of the said chattels, and the said defendant is entitled to the possession by virtue of the execution so held, as aforesaid.

(Jurat.)

WILLIAM WEBB.

Form for Undertaking by Defendant.

(Title as before.)

Whereas, the plaintiff in this action has claimed the delivery to him of certain chattels specified in the affidavit made by William M. Hayes, one of the plaintiffs in this action, for that purpose, of the alleged value of \$400, and has caused the same to be replevied by the coroner of the county of Ulster pursuant to the statute, but the same have not yet been delivered to the plaintiff; and, whereas, the defendant is desirous of having the said chattels returned to him:

Now, therefore, we, Daniel Bennet, merchant, of the city of Kingston, Ulster county, N. Y., and Simon Naylor, builder, of said city, for the procuring of such return, and in consideration thereof, do hereby jointly and severally undertake and become bound to said coroner in the sum of \$800 for the delivery of said chattels to the plaintiffs, if delivery thereof is adjudged, or if the action abates in consequence of the defendant's death, and for the payment to him of any sum which the judgment awards against the defendant.

(Date.)

(Signatures.)

ARTICLE VII.

CLAIM OF TITLE BY THIRD PERSON. §§ 1709-1711

§ 1709. Claim of title by third person; proceedings thereupon.

At any time before a chattel, which has been replevied, is actually delivered to either party, if a person, not a party to the action, claims, as against the defendant, a right to the possession thereof, existing at the time when it was replevied, an affidavit may be made and delivered to the sheriff in his behalf, stating that he makes such a claim; specifying the chattel or chattels to which it relates, if two or more chattels have been replevied, and the claim relates only to part of them; and setting forth the facts upon which his right of possession depends. In that case, the sheriff may, in his discretion, before he delivers the chattel to the plaintiff, serve upon the plaintiff's attorney a copy of the affidavit, with a notice that he requires indemnity against the claim. If the indemnity is not furnished within a reasonable time after the plaintiff becomes entitled to the delivery of the chattel, the sheriff may, in his discretion, deliver it to the claimant without incurring any liability to the plaintiff by reason of so doing.

§ 1710. Action against sheriff upon such claim.

A person, not a party to the action, who has served an affidavit as prescribed in the last section, may maintain an action against the sheriff who has delivered

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the chattel to the plaintiff, to recover his damages by reason of the taking, detention or delivery of the chattel. But the summons in such an action must be issued within three months after the delivery of the chattel to the plaintiff and must be served within three months after it is issued. An action cannot be maintained against a sheriff by a person so entitled to make a claim except as prescribed in this section.

§ 1711. Indemnity to sheriff against such action.

The indemnity to be furnished to the sheriff by the plaintiff, as prescribed in the last section but one, must consist of a written undertaking to him, executed by at least two sureties, to the effect that they will indemnify him against any liability for damages, costs or expenses to be incurred in an action brought against him by the claimant, or a person deriving title from or through the claimant, by reason of the taking or detention of the chattel, or its delivery to the plaintiff, not exceeding a sum, to be specified in the undertaking, which must be at least five hundred dollars, and not less than the actual value of the chattel claimed, and two hundred and fifty dollars in addition thereto. Each of the sureties, besides possessing the other qualifications required by law, must be a freeholder or a householder of the sheriff's county. The sheriff, before delivering the chattel, may require the persons offered as sureties to submit to an examination, before the officer who takes the acknowledgment of the undertaking, as where persons are offered to him as bail upon an arrest. The sureties are entitled to be substituted as defendants in an action, brought as prescribed in the last section, as if the chattel had been levied upon by virtue of an execution.

The remedy for a wrongful taking of property not mentioned in the plaintiff's affidavit is by action against the sheriff, and not by bond for its return. *Klinkowstein v. Greenberg*, 15 Misc. 479, 37 N. Y. Supp. 206, 72 St. Rep. 785. Service of affidavit of title in a third person claiming property was held good under § 216 of former Code when served on clerk in the office of the officer having the property, who was in charge of the office business. No other demand is necessary to the maintenance of an action against an officer than the service of affidavit and notice of claim. One having title to and right to possession of property taken in replevin, who has presented his claim in pursuance of law, may maintain an action against the sheriff for a conversion of the property. When the officer has obtained indemnity he is bound to keep the property or deliver it to plaintiff; the service of the notice of claim and affidavit suspends that obligation and releases him from it unless indemnity is given; when given, the obligation again attaches, and the claim of the person entitled to the property is valid, the officer being required to rely upon the indemnity. *Manning v. Keenan*, 73 N. Y. 45. It is unnecessary to call a jury in such cases. *Haskins v. Kelly*, 1 Abb. (N. S.) 63. The

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delivery mentioned in this section is not a formal but a complete manual delivery, so that nothing further remains to be done. *Second Nat. Bank v. Dunn*, 63 How. 435. The only way in which a third party can assert his title to goods taken by the sheriff in replevin is that described in *Edgerton v. Ross*, 6 Abb. 189. Except in cases where the property was not that described in the affidavit, or where it was taken from the possession of a person other than the defendant or his agent. *King v. Orser*, 4 Duer. 431.

Where an officer, by virtue of process valid upon its face, but void for want of jurisdiction in the court issuing it, has levied upon and taken possession of property against another officer, who, by virtue of process against the owner, apparently valid, has taken it from plaintiffs, the invalidity of the process under which plaintiff acted may be shown, but defendant's process protects him, and its validity cannot be assailed. Plaintiff's process and his possession under it establish *prima facie* a right of action. *Clearwater v. Brill*, 63 N. Y. 627.

Affidavit of Claim by Third Person.

(Title of cause.)

ULSTER COUNTY, ss. :

Cornelius J. Townsend, of said county, being duly sworn, says: That he claims, as against the defendant herein, the right to the possession of certain hereinafter described chattels, such right existing at the time that said chattels were in this action replevied of the defendant by the sheriff of the county of Ulster; that this deponent is and was, at the time of such taking, lawfully entitled to the possession of such chattels, which are described as follows: (Here follow with chattels claimed); that deponent's right to such possession arises from a bill of sale of the above-named chattels, duly delivered and executed by the above-named defendant to this deponent prior to the replevy made as aforesaid, by the said sheriff of the county of Ulster, and that deponent had taken possession of said chattels under and by virtue of said bill of sale, delivered as aforesaid.

(Jurat.)

CORNELIUS J. TOWNSEND.

Notice to be Indorsed on the Above.

To the Sheriff of the County of Ulster :

Take notice that I claim the chattels within referred to, and demand that you deliver them to me.

(Date.)

CORNELIUS J. TOWNSEND.

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ARTICLE VIII.

PRACTICE PECULIAR TO REPLEVIN. §§ 1689, 1693, 1713, 1714,
1718, 1719, 1736,

- SUB. 1. JURISDICTION BEFORE SUMMONS SERVED. § 1693.
2. UNITING CAUSES OF ACTION AND REVIVING ACTION. §§ 1689, 1736.
3. REPLEVIN WHERE ORDER OF ARREST GRANTED. § 1714.
4. SUBSEQUENT REPLEVIN. § 1713.
5. ABANDONMENT OF CLAIM TO PART OF PROPERTY BY PLAINTIFF. § 1719.
6. ACTION NOT AFFECTED THOUGH NO REPLEVIN. § 1718.
7. GENERAL MATTERS OF PRACTICE.

SUB. 1. JURISDICTION BEFORE SUMMONS SERVED. § 1693.

§ 1693. Jurisdiction, etc., when replevin precedes summons.

Where a chattel is replevied before the service of the summons, as prescribed in this article, the seizure thereof by the sheriff is regarded as equivalent to the granting of a provisional remedy, for the purpose of giving jurisdiction to the court, and enabling it to control the subsequent proceedings in the action; and as equivalent to the commencement of the action, for the purpose of determining, whether the plaintiff is entitled to maintain the action, or the defendant is liable thereto.

The failure of the sheriff to deliver the summons with the other papers in replevin is not fatal to the jurisdiction of the court; the jurisdiction is prescribed by this section when read in connection with § 416. The seizure of the chattels is deemed equivalent to the granting of a provisional remedy for the purpose of giving jurisdiction to the court, and enabling it to control the future proceedings in the action, and as equivalent to the commencement of an action for the purpose of determining whether or not the plaintiff had the right to maintain the action or the defendant is liable thereto. *Acker v. Hauteman*, 27 Hun, 48.

SUB. 2. UNITING CAUSES OF ACTION AND REVIVING ACTION.

§§ 1689, 1736.

§ 1689. Joinder of action with others.

Nothing in this title is to be so construed, as to prevent the plaintiff from uniting, in the same complaint, two or more causes of action, in any case specified in section 484 of this act.

§ 1736. Abatement and revival of action.

In an action to recover a chattel, the cause of action survives or continues, notwithstanding the death of either party, in favor of or against his executor or administrator. Where the court makes an order, directing the abatement of such an action, as prescribed in section 761 of this act, an action may be maintained, upon an undertaking, given for the purpose of procuring a delivery or return of a chattel, as if final judgment, awarding to the adverse party posses-

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sion thereof, had been rendered in the first action, and an execution thereupon had been returned unexecuted and unsatisfied; except that damages cannot be recovered therein for a wrongful taking, withholding or detention. An action to recover the chattel cannot be maintained, after an action has been commenced upon an undertaking, as prescribed in this section.

The codifiers say that, in most cases, the provisions relating to abatement by death work satisfactorily, but that they often lead to injustice in this class of cases.

"The rules of law on this subject are well summed up, and the principal cases cited by Davies, Ch. J., in *Potter v. Van Vranken*, 36 N. Y. 619. The most glaring injustice is that the action does not abate when the plaintiff dies, but the death of the defendant abates it absolutely beyond the power of the court to revive it for any purpose. Evidently the same rule ought now to apply where either party dies; for the defendant has the right which the plaintiff formerly had to retain the subject of the litigation, and if the action abates by his death, his undertaking to restore the property is avoided. Accordingly this section places each party upon the same footing in that respect, and saves the undertaking on either side notwithstanding the abatement. But the right to replevy anew a chattel is preserved, if the survivor elects to pursue that remedy, and the theory upon which the action abated by the defendant's death is recognized by forbidding a recovery for damages, if the surviving party elects to sue upon the undertaking."

It is said in *Roberts v. Marsen*, 23 Hun, 486, that it seems, under the Revised Statutes and old Code, an action of replevin did not abate upon the death of a sole defendant. It was held in *Burnham v. Brennan*, 60 N. Y. 310, that the section was not retroactive, and applied only to actions in which the sole defendant was living when this Code went into effect.

SUB. 3. REPLEVIN WHERE ORDER OF ARREST GRANTED. § 1714

§ 1714. Replevin, where order of arrest has been granted.

Where an order of arrest is granted, as prescribed in title first of chapter seventh of this act, the plaintiff's right to a replevin is subject to the following regulations:

1. If the defendant has been arrested, pursuant to the order, a subsequent replevin cannot be made of the chattel, with respect to which the order was granted.

2. If the defendant has not been arrested, a subsequent replevin of a chattel, with respect to which the order was granted, supersedes the order.

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An order of arrest should, on its face, disclose the grounds of the authority for the arrest and the specific character of the bail to be exacted, but omission to do so does not render the officer liable. *Josuez v. Murphy*, 6 Daly, 324. An order of arrest may be granted, if defendant has disposed of the property, even though without intent to defeat the particular remedy. *Thompson v. Strauss*, 16 Week. Dig. 503. An order of arrest will not be vacated merely because plaintiff has no cause of action as to part of the property for the removal or concealment of which the order was granted; *Barnett v. Selling*, 70 N. Y. 492; and the obtaining possession of a portion of the property claimed is no waiver by plaintiff of the right to arrest defendant. *Tracy v. Veeder*, 35 How. 209; *Zinn v. Ritterman*, 2 Abb. (N. S.) 261. See *Wright v. Fuld*, 64 How. 117, for instance, where order of arrest was vacated because complaint did not allege sufficient facts. In *Cook v. Freudenthal*, 80 N. Y. 202, the liability of sureties on an undertaking given on an order of arrest in replevin is fully considered, as is also the effect of the order of arrest in case of final judgment.

An order of arrest in replevin will be granted only where it is alleged in the complaint that the property or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff, with the intent that it should not be so found or taken or to deprive plaintiff of the benefit thereof, although where the same facts are set forth in an action for the recovery of damages for the unlawful conversion of the property, an order of arrest may issue, referring to § 549 of the Code. *Hough v. Folmsbee*, 59 Hun. 148, 20 Civ. Pro. R. 111.

SUB. 4. SUBSEQUENT REPLEVIN. § 1713.

§ 1713. Second and subsequent replevin; proceedings thereupon.

Where the sheriff has replevied a part only of a chattel, or of two or more chattels, described in the plaintiff's affidavit, and has served upon the defendant the papers required upon such a replevin, the plaintiff may, at any time before the service of a copy of the defendant's answer, or before judgment by default for want of an appearance or pleading, require the same or any other sheriff, to replevy any other part thereof. For that purpose, he must deliver to the sheriff an affidavit, containing the same allegations, and a requisition and undertaking, with respect to the part yet to be replevied, as if the action was brought to recover that part only. Where a second or subsequent replevin is made, as prescribed in this section, the proceedings are the same, as if a former replevin had not been made.

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 SUB. 5. ABANDONMENT OF CLAIM TO PART OF PROPERTY BY
 PLAINTIFF. § 1719.

§ 1719. When and how plaintiff may abandon his claim as to part.

Where part only of two or more distinct chattels specified in the complaint, has been replevied, the plaintiff's attorney may, with or before the notice of trial, serve upon the defendant's attorney a notice that he abandons so much of his claim, as relates to those which have not been replevied; and thenceforth the proceedings are the same, as if the action had been brought to recover only the chattels which have been replevied. A copy of the notice must be furnished to the court, or to the referee, upon the trial of an issue of fact, with a copy of the summons and of the pleadings.

SUB. 6. ACTION NOT AFFECTED THOUGH NO REPLEVIN. § 1718.

§ 1718. Action not affected by failure to replevy.

The plaintiff may proceed in the action, and recover therein the chattel, or its value, although he has not required the sheriff to replevy it, or the sheriff has not been able to replevy it.

SUB. 7. GENERAL MATTERS OF PRACTICE.

The giving of a bond of indemnity by a party is slight evidence connecting him with a tortious taking by an officer. *Welsh v. Cochran*, 63 N. Y. 181. The defendant who has furnished an undertaking for the return of property which admits the plaintiff has taken the property described in the affidavit and requisition, cannot contradict such recitals. It seems that if defendant desires to raise the question of the identity of the goods with those claimed by the plaintiff, he should not admit it in the bond, but sue the sheriff for the taking or levy of the property in his hands, and after the trial, if successful, would receive the property or its value. *Martin v. Gilbert*, 119 N. Y. 298. See note, 22 Abb. N. C. 151.

The condition of an undertaking given by the defendant to reclaim the property does not become fixed and determined until the final decision of the action; that right does not exist where there has been an appeal from the judgment, until the appeal is disposed of. *Corn Exchange Bank v. Blye*, 102 N. Y. 305, 2 St. Rep. 8, affirming 37 Hun, 473. Where the defendant has given an undertaking for the return of the property, it is error for the court to charge that the jury must find that the property must have been in the defendant's possession as defendant is precluded by the recital in the undertaking from denying that fact. *Blake v. McNamara*, 9 Misc. 212, 60 St. Rep. 832, 29 Supp. 676.

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Where defendant's affidavits in proceedings to rebond the property complied with the statute, the court has power to allow a new undertaking to be filed *nunc pro tunc*. *Hafelin v. Silverman*, 11 Misc. 723, 32 Supp. 918, 66 St. Rep. 344. A mere statement on the back of an undertaking that the justice received an affidavit and notice with such undertaking, is not an allegation that a sufficient affidavit or notice was received, nor does it amount to an allowance of the undertaking. *Barton v. Donnelly*, 6 Misc. 473, 57 St. Rep. 701, 27 Supp. 525.

Where the referee found that property was worth a certain sum and the depreciation amounted to a certain other sum, it was held that the finding as to value must be taken as at the time of the trial, and that the allowance for depreciation must be set aside in the absence of a finding or of evidence that the value of the property had depreciated. *Crossley v. Hojer*, 11 Misc. 57, 63 St. Rep. 440, 31 Supp. 837. The objection that the jury fixed value of the property as of the date of the levy instead of that of the trial, cannot be taken for the first time on appeal. *Brackeleer v. Schwabeland*, 86 Hun. 143, 33 Supp. 212, 66 St. Rep. 840.

The complaint cannot be dismissed because of failure of proof of value at the time of the trial, as plaintiff, if successful, is at least entitled to nominal damages. *Bartels v. Fischer*, 11 Misc. 460, 32 Supp. 1138. Failure to prove value is not sufficient ground for dismissal of the complaint. *Hay v. Muller*, 7 Misc. 670, 58 St. Rep. 342, 23 Civ. Pro. R. 321, 28 Supp. 57, citing *Hammond v. Morgan*, 101 N. Y. 179, and distinguishing *Button v. Chapin*, 7 Civ. Pro. R. 278. A judgment which simply dismissed the complaint is a bar to a subsequent action to recover damages to the goods caused by their detention. *Ritchie v. Talcott*, 10 Misc. 412, 63 St. Rep. 598, 31 Supp. 196.

Where in replevin for bonds a judgment contained an allowance for damages in addition to the amount fixed by the jury the error should be corrected by motion and the determination on appeal is not conclusive upon such motion. *Corn Exchange Bank v. Blye*, 7 Supp. 434. The legal effect of the discontinuance of the action of replevin is the abandonment of the plaintiff's claim and the surrender of the property to the defendant. *Rosenberg v. Flack*, 32 St. Rep. 449, 10 Supp. 759. Where the party gave a receipt acknowledging he had received the goods from the officer and promised to deliver them to him on demand or on default to

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pay the amount of the execution, *held*, that he was estopped to deny that he had possession of the goods when the action was commenced. *Austin v. Waufol*, 13 Supp. 134.

A motion by defendant to set aside proceedings in replevin because of insufficiency of plaintiff's affidavit would be denied where plaintiff made no objection to the affidavit until his time to answer had expired and where the notice of motion does not accurately specify irregularity in the affidavit. Where the notice of motion asked "for such other and further relief as may be just" leave was granted defendant, who was in default to answer on the usual terms. *Paddock v. Guyder*, 8 Supp. 905, 29 St. Rep. 773. Where in an action of replevin the complaint set forth two inconsistent causes of action and the defendant moved at the trial to compel the plaintiff to elect between them, it was held the court might decline to decide the motion until a part or all of the evidence was taken, and any denial of the motion was discretionary so far that it would not be reviewed in the Court of Appeals when it appeared defendant was not harmed; no motion had been made to make the complaint more definite and certain; it was held the defect did not require a reversal. *Tuthill v. Skidmore*, 124 N. Y. 149, 1 Supp. 445. The allegations of the affidavit of defendant as to a third person's claiming the property may be made on information and belief. *Lang v. Lewi*, 32 St. Rep. 418.

Where the complaint alleges partnership or ownership of the property and its value, which is denied by the answer, and the complaint also alleges unlawful possession and detention by defendant who had levied on the property under execution against a third person, and that the property was not that of a third person, and the answer admits these facts, it is too late, at the trial after plaintiff has proved the facts denied and rested, to permit defendant to amend his answer and withdraw his admission so as to allege ownership in the third person. *Butler v. Farley*, 1 Supp. 849. Where plaintiff showed that he was the owner of the property, that it was wrongfully detained by defendant and that the alleged cause of the detention was that defendant claimed to have purchased it from some person or persons unknown to the plaintiff, it was *held* that plaintiff had made a case upon which a verdict should have been directed in his favor. *Segelke v. Finan*, 6 St. Rep. 682.

Where defendant does not require the return of the property

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under § 1704 and no claim is made by a third person under § 1709, plaintiff is entitled to its possession, and an order, under § 820, of interpleader authorizing the substitution for defendant of another claiming the property, cannot be made, as defendant cannot deliver the possession of the property as required by that section. *Pelham Hod Elevating Co. v. Baggaley*, 12 Supp. 218. Where the goods are replevied on the ground of fraud in their purchase, it is a question of intent at the time of the purchase on the part of the defendant and also at the time of the reception of the goods. *Whitten v. Fitzwater*, 33 St. Rep. 953.

Where goods have been procured from the owner by fraud, the owner cannot maintain the action of replevin and afterwards sue for their value in case he has secured some benefit from his first action, otherwise if the first action has been discontinued before defendants sustained any injury from its prosecution, and this is independent of the fact that the plaintiff may have replevied the property in the first suit, nor is it applicable where it appears that at the time the first action was brought, plaintiff had no knowledge that the representations upon the faith of which the sale was made were fraudulent or untrue. *Wile v. Brozanstein*, 35 Hun, 68; *The Equitable Co-operative Foundry Company v. Hersee*, 33 Hun, 169; S. C. 103 N. Y. 25; *Bach v. Tuch*, 47 Hun, 536; *Johnson v. Freew*, 33 Hun, 193; *Hays v. Midas*, 104 N. Y. 602.

In an action to replevy goods on the ground the sale was induced by fraud the referee refused to find plaintiff relied on the false representations made by defendant, although there was evidence of that fact, there was no proof or finding that the representations were known to be false by the party making them or that they were made with intent to defraud, *held*, that the error in refusing to find as requested was not prejudicial to plaintiff. *Morris v. Wells*, 26 St. Rep. 9. The warrant in replevin protects the sheriff in taking property under it from the defendants named therein, no matter to whom it belonged, and no action can be maintained against him therefor except after service of affidavit of claim. *Hastings v. Nagel*, 83 Hun, 205, 31 Supp. 598, 64 St. Rep. 152.

When plaintiff, who sues for possession of a chattel, has established *prima facie* title and right to possession, it is sufficient and becomes incumbent on defendant to justify his possession. *Bame v. Scykora*, 77 Hun, 529, 60 St. Rep. 271, 28 Supp. 930.

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Where the plaintiff, pending an action to replevin a savings bank book given to secure payment of the purchase money of real estate, recovers judgment in an action to rescind the contract for the purchase and for the entire amount of purchase money paid including that represented by the book, she cannot recover in the action of replevin the whole sum in bank. *Keller v. Feldman*, 81 Hun. 593.

Possession by defendant need not be proved where the answer avers that the property was taken from him in the action and prays for its restoration. *Schwabeland v. Halohan*, 10 Misc. 176, 62 St. Rep. 518, 30 Supp. 910. Where the complaint might be held to be drawn in a double aspect both for the wrongful taking and for the wrongful detention and proof was given only to show the wrongful detention, it was held that the action should be treated as though it had been brought for a wrongful detention only. *Griffin v. L. I. R. R. Co.* 101 N. Y. 348.

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EVIDENCE.

Plaintiff's evidence that defendant, at the time of purchasing goods from him on credit, represented that his business was in excellent condition; that he was doing an excellent business; making money; capital his own, and that he did not owe any of it; *held*, to support the allegation of the complaint, that defendant reputed himself to be solvent and able to pay his debts. *Roome v. McGovern*, 9 Daly, 60. In replevin defendant's counsel, in opening, proposed to show fraud in the contract with the defendant, by which plaintiff acquired such right as he had to the property; *held*, error to exclude this evidence and direct a verdict for defendant. *Butler v. Reynolds*, 3 T. & C. 241. Defendant being constable, taking the property of plaintiff under a requisition in replevin against a third person, *held*, in an action to recover it, that the requisition was no protection, and evidence of the proceedings and result in the action in which it was issued was immaterial. *Sheffield v. Clark*, 12 Week. Dig. 226. It seems that in replevin failure of proof by plaintiff as to damages sustained by detention, or as to value of property, is not ground for dismissal of complaint. *Banfield v. Haeger*, 7 Abb. N. C. 318. Where plaintiff sued to recover two cars which he claimed as

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property of the railroad of which he was receiver, and on the trial, under a general denial, defendant offered to prove that it had title from a railroad owning the cars previous to their being sold to plaintiff's railroad, and also offered to prove title in a railroad from which defendant leased them, both of which offers were excluded as not set up in the answer, *held*, such exclusion was error. *Griffin v. L. I. R. R. Co.* 1 St. Rep. 56.

In an action to replevy certain personal property where the answer admitted the possession, but denied its wrongful character without setting up any affirmative defence, defendant was permitted to prove the property was taken by him under a tax warrant delivered to him as marshal; *held*, that there was error, as the evidence was new matter, by way of justification, and was required to be pleaded in order to be proved; that defendant's remedy was by motion for leave to amend his answer, and not by application to conform the pleadings to the facts proved. *American Tool Co. v. Smith*, 24 Week. Dig. 228. In replevin parol evidence of an agreement made, or understanding had, after a vendee had executed his note and taken possession of a bill of sale for goods, that title and possession should remain in possession of the vendor, until the price should be paid or secured, is admissible. *Keeney v. Swan*, 2 St. Rep. 214; S. C. 24 Week. Dig. 454.

The declarations of a judgment debtor or his agent, made after levy which tend to establish facts authorizing the vendor of the goods in question to rescind the sale are not admissible against the sheriff in an action to replevy such goods. *Wise v. Grant*, 37 Supr. 39. In an action of replevin unsworn declarations of plaintiff as to his ownership made out of court, are not admissible. *Root v. Borst*, 142 N. Y. 62, 36 N. E. Rep. 814, 58 St. Rep. 421.

If plaintiff after a seizure of property by the sheriff in replevin causes his sureties to justify, it is *prima facie* evidence that he directed the property to be taken. *Aldrich v. Ketcham*, 3 E. D. Smith, 577. But where a marshal seized goods under a warrant, and defendants were shown to have given him a bond, but its terms were not proved, it was held but slight evidence connecting with a tortious taking. *Welsh v. Cochran*, 63 N. Y. 181, reversing 5 T. & C. 699.

Where the defendant gave an undertaking for the return of the

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property admitting plaintiff had taken the property described in his affidavit on requisition, from defendant's possession, he is estopped from denying he had possession of the property or any part thereof at the commencement of the action or from showing that it was different or other property. He is concluded by the recitals in the undertaking, and the effect of the recitals is not changed by the service of an answer denying that defendant ever had possession of the property in question. As plaintiff's affidavit, requisition and the return are part of a judgment-roll, and a copy of that is required to be furnished to the court on the trial, it is not necessary to put them formally in evidence in order that the court may consider them. *Martin v. Gilbert*, 119 N. Y. 298, 29 St. Rep. 440, reversing 18 St. Rep. 1033.

It was held in *Nowell v. Gilbert*, 49 Hun, 489, 2 Supp. 525, 18 St. Rep. 639, that such an undertaking, although not signed by defendant if procured by his attorney, estops him from denying his possession of the property replevied, but does not conclusively estop him from showing that the property replevied does not embrace all that was mentioned in the affidavit, but it must be regarded as mere evidence, and not as an estoppel as to property which it did not procure to be returned.

Where plaintiff establishes a *prima facie* title and right to possession, and there is no evidence as to how defendant came into possession of the chattel, plaintiff is entitled to recover. *Bame v. Scykora*, 28 Supp. 930, 77 Hun, 529. In replevin by a married woman to recover chattels taken on execution against her husband, evidence that she bought the property is not conclusive of her ownership, and if there was sufficient evidence to require the verdict of the jury as to whether her husband was not the true owner, a new trial of the merits may properly be denied. *Pollock v. Brennan*, 39 Supr. 477.

In an action by a mortgagee of chattels to recover possession from the warehouse man with whom they had been stored by the mortgagor, without plaintiff's knowledge, the complaint averred that the plaintiff was entitled to possession which the answer denied and set up a lien for storage, *held*, plaintiff had a right to show that he was entitled to possession at the time of the commencement of the action, or at the trial, and that defendant had neither a debt or lien by showing that such claim for storage had been paid. *Eisler v. Union Transfer & Storage Co.* 35 St. Rep.

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374. Plaintiff must establish his title to the chattels involved, and where it appears he had leased them to a third party under an agreement that the title should vest in the latter, on payment by him of certain sums of money, it is material to show what payments have been made. *Scotfield v. Kruiser*, 14 Supp. 274.

The refusal of a servant to deliver goods of his master on demand by a stranger, is not sufficient evidence to maintain replevin where demand and refusal are necessary, unless the servant acted under the direction of the master in refusing to deliver. *Goodwin v. Wertheimer*, 99 N. Y. 149. Proof that the plaintiff in whose possession the property is found asserts title in a third person, and maintains possession under it, refusing to deliver it to any one except upon the latter's order, is sufficient to justify a finding of a refusal. *Tuttle v. Hazard*, 13 Week. Dig. 222, 86 N. Y. 628.

An allegation of a wrongful detention is made out by proof of a conversion. *Rawley v. Brown*, 18 Hun, 456. Refusal to deliver is not evidence of conversion if on request the authority to make the demand is not produced. *Nelson v. Neil*, 7 Week. Dig. 362. A stipulation that there has been a demand and refusal, and that defendants claim to hold the property, renders it unnecessary to give evidence of demand and refusal upon the trial. *Mechanics & Traders' Bank v. Farmers & Mechanics' Nat. Bank*, 60 N. Y. 40, modifying 2 T. & C. 395. Plaintiff demanded possession of a piano in the building where defendant was at work, piano being in the house adjoining, it was held for the jury to determine whether defendant's withholding permission to plaintiff to take the piano in connection with the assertion of title to the property was not equivalent to a refusal to surrender. *Fry v. Clow*, 50 Hun, 574.

In replevin to recover goods on the ground that the sale thereof was induced by fraudulent representations, evidence of similar representations made to a commercial agency on the faith of which others sold goods to defendants, is admissible on the question of intent. *Bloss v. Sickels*, 142 N. Y. 647, 36 N. E. Rep. 1064, 59 St. Rep. 168. In an action to replevy goods from the assignee on the ground of fraud, it was not error to permit the assignor or purchaser of the goods to testify that he did not purchase them with the intent to cheat the plaintiffs or with intent not to pay for them. *Morris v. Wells*, 26 St. Rep. 9.

 Art. 10. Damages Recoverable and Form of Verdict.

Where, in an action to recover goods obtained on credit by fraudulent representations, there was no direct evidence of value, but the price agreed to be paid by the purchaser and by subsequent purchasers under him were shown, it was *held* that in the absence of evidence to the contrary, the inference was that the goods were worth the price for which they were originally purchased. *Grossman v. Walters*, 11 Supp. 471. On direct examination of defendant, an action by the seller to recover goods procured from them by false representations of defendant, the question whether defendant was asked to purchase goods from other merchants after his purchase from plaintiff is properly excluded as having no bearing on the intent with which defendant purchased the goods in question. *Hahlo v. Grant*, 10 Supp. 188.

Evidence of the false representations by which the purchaser obtained property is admissible in an action to recover its possession by the seller against the sheriff who levied on it in the hands of the purchaser. *Lewis v. Flack*, 10 Supp. 535. The offer of a certain price for the use of property is not competent proof of damages. *Young v. Atwood*, 5 Hun, 234. Even if no evidence of value of the property converted is given, the complaint should not be dismissed, for plaintiff has a right to recover nominal damages for the injury without proving its value. *Davis v. Morrell*, 16 Week. Dig. 530.

ARTICLE X.

 DAMAGES RECOVERABLE AND FORM OF VERDICT. §§ 1722,
1726-1729.

§ 1722. Damages when chattel injured, etc. by defendant.

Where the plaintiff recovers a chattel which was injured, or otherwise depreciated in value, while it was in the possession or under the control of the defendant, under such circumstances, that the plaintiff might recover damages for the injury or depreciation, in an action brought against the defendant therefor, he may recover the same damages in an action brought as prescribed in this article. In that case, he must set forth the facts in his complaint, and demand judgment for damages accordingly.

§ 1726. Verdict, etc. what to state.

The verdict, report, or decision must fix the damages, if any, of the prevailing party. Where it awards to the plaintiff a chattel, which has not been replevied, or where it awards to the prevailing party a chattel, which has been replevied, and afterwards delivered by the sheriff to the unsuccessful party, or to a person not a party, it must also, except in a case specified in the next section, fix the value of the chattel, at the time of the trial.

Art. 10. Damages Recoverable and Form of Verdict.

§ 1727. Substitute in certain cases for finding as to value.

A verdict, report, or decision, in favor of the defendant shall not fix the value of the chattel, in either of the following cases:

1. Where the plaintiff is the general owner of the chattel; but it was rightfully distrained doing damage, and its value is greater than the damages sustained by the defendant, by the injury for which it was distrained; in which case, those damages must be fixed.

2. Where the plaintiff is the general owner of the chattel, but the defendant had a special property therein, and the value of the chattel is greater than the value of the special property, or the sum charged upon the chattel by reason thereof; in which case, the value of the special property, or the sum so charged, must be fixed.

In either of the cases specified in this section, the verdict, report, or decision must set forth the reason why the value of the chattel is not fixed.

§ 1728. Verdict, etc. for part of several chattels; judgment thereupon.

Where the action is brought to recover two or more chattels, the verdict, report, or decision may award to one party one or more distinct chattels, which can be identified, and set apart from the others and the residue to the other party; and, if necessary, the complaint must be amended so as to conform thereto. The final judgment, rendered thereupon, must award to each party the same relief, with respect to the finding in his favor, as if separate judgments were rendered; except that, where each party is entitled to an absolute award of a sum of money, against the other, the smaller sum must be deducted from the greater, and the balance only must be awarded.

§ 1729. Damages, how ascertained on default.

Where the plaintiff is entitled to judgment by default, for want of an appearance or pleading, the court, to which he applies for judgment, may ascertain and determine the damages to which he is entitled, and the value of the chattel, if necessary; or may direct a reference, or a writ of inquiry, for that purpose.

Under § 1722 see *Brester v. Silliman*, 38 N. Y. 423; *Allen v. Fox*, 51 N. Y. 562; *Guaranty and Indemnity Co. v. Flynn*, 55 N. Y. 653; *Schoonmaker v. Kelly*, 42 Hun, 299.

Where the property has not been delivered the jury should assess its value with damages for its detention. *Phillips v. McVillie*, 10 Hun, 211. The value at the time of the trial is the real subject of inquiry and the proper subject of proof; such value is the substitute for the property if not delivered; damages for the loss of use or depreciation are included in damages for the detention. *Brester v. Silliman*, 38 N. Y. 423. It is a good verdict to find for "plaintiff for the full value of the goods not returned and assessing their value at the sum of \$1,164.27." This is a verdict in favor of the plaintiff, assessing the value of the merchandise at the sum named. *Lewisohn v. Apple*, 7 St. Rep. 223. Where replevin was brought for promissory notes, not enforceable

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because not properly executed, their value was held to be nominal, and the trial court erred in directing their value to be assessed at the amount appearing to be due upon their face instead of at a nominal sum. *Davis Machine Co. v. Bert*, 105 N. Y. 59. The successful party is entitled to the value at the time of trial, and not at any intermediate time between taking and trial. If the value has been impaired during the detention, it should be included in the damages. In the absence of proof to the contrary, damages are presumed to be the interest during time of wrongful deprivation. *N. Y. Guaranty Co. v. Flynn*, 55 N. Y. 653. Where either the goods are not taken by plaintiff, or defendant reclaims them, the jury should find the value at the time of the verdict, and its depreciation from any causes proved by the evidence. Interest should be allowed on the whole amount. *Young v. Willett*, 8 Bosw. 486.

Where the jury find a verdict for the plaintiff, but award no damages for the detention, the court may supply the omission by inserting nominal damages. *Van Schoening v. Buchanan*, 23 How. 44. In an action to recover possession of personal property, the jury found as follows: "A verdict for the plaintiff, and assess the value of the goods when taken at the sum of \$3,090.90, and the depreciation of the goods since taking at the sum of \$650.50." There was a conflict of evidence as to the quantity of goods taken; plaintiff entered judgment for the recovery of the "property described in the complaint, \$650.50 damages, and in case a return, etc., cannot be had, for \$3,090.90, the value of said property at the time of the taking," etc. *Held*, that the judgment was in conformity with the verdict; that the verdict was general and settled every issue in plaintiff's favor; that it was in form correct, and that if there was any doubt on the subject the point should have been made when the verdict was received. *Soria v. Davidson*, 23 Week. Dig. 322.

In an action to recover possession of a team of mules and damages for their detention, the value of the use of the team is the measure of damages and not the interest on their value. *Slocum v. Declano*, 17 Week. Dig. 207. When the jury assessed the value of the goods, and stated it was to be reduced by future charges and advances, but did not assess them, *held*, not to justify a judgment. *Wood v. Orscr*, 25 N. Y. 348. The jury, if they find for plaintiff, should assess the value of the property. That value is

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to be accepted as a substitute for the property itself where the sheriff cannot obtain possession of the property. The jury, in assessing the damages, should be governed by the same principles in the assessment of the value of the property by which they are governed on the assessment of damages. They should not go beyond the amount stated in the pleadings and included in the issues in the action. *Tiedman v. O'Brien*, 36 Super. Ct. 539.

Where the plaintiff claims a general interest as mortgagee, the defendant being the general owner with right to redeem, the proper judgment is for a return of the property, or its value, fixed at the sum which is the value of the plaintiff's interest. *Allan v. Judson*, 71 N. Y. 77. Where the plaintiff, to whom the property is delivered, is the general owner, and the defendant who prevails in the action has only a lien, the recovery should be limited to the amount of such lien. *Fowler v. Haynes*, 91 N. Y. 346, distinguishing *Buck v. Remsen*, 34 N. Y. 383. The right to interest on the assessed value of the property is subject to the same conditions as the principal sum, that is, the non-delivery of the property. *Munsell v. Flood*, 46 Super. Ct. 134. That a party is only entitled to judgment to the extent of his lien, if he have a special property, as against the general owner, see *Smith v. Keyes*, 2 T. & C. 650; *Rhoads v. Woods*, 41 Barb. 471. In an action between the lienor and general owner, the damages should be only the amount of the lienor's interest. *Seaman v. Luce*, 23 Barb. 240; *Townsend v. Barge*, 57 N. Y. 665; *Fitzhugh v. Wiman*, 9 N. Y. 559. The expenses of taking and removing the property by the sheriff are not to be included in the damages for the detention. They should be added to the costs. *Young v. Atwood*, 5 Hun. 234. *Prima facie*, negotiable securities are presumed to be in the hands of a *bona fide* holder for value, and to be worth the amount unpaid thereon, with interest; but this may be met by proof of the maker's inability to pay, but not by proof of the market value. *Western R. R. Co. v. Bayne*, 75 N. Y. 1.

In an action by a vendor of goods against the sheriff, who has seized the same under an attachment against the purchaser, it is not error, on directing a judgment in favor of the defendant, to assess the value of the property at its full amount, notwithstanding that plaintiff has an equitable mortgage on the property by the terms of sale. *Empire State Type Foundry v. Grant*, 44 Hun, 434, reversed 114 N. Y. 40. In an action for conversion of

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a promissory note, the measure of value is the amount of the note and interest, unless it appears that it is of less value because of something which legitimately impairs or affects its value, or affects its validity. The rule is the same whether the note is that of plaintiff or a third person. *Thayer v. Manly*, 73 N. Y. 305. Same rule, and also that defendant may show, in reduction, payment in whole or in part, inability of maker to pay release to him, or any other matter which legitimately diminishes the value. *Booth v. Powers*, 56 N. Y. 22. Where, in an action of replevin, it appeared that defendant had mixed other grain of his own with that claimed by the plaintiff, defendant claimed, when it was taken by sheriff, it was all raised on plaintiff's land. *Held*, the case was simply one of confusion of goods, and as the grain was mixed by defendant he could not thus, by his own act, defeat the action, but must bear the loss resulting therefrom. *Samson v. Rose*, 65 N. Y. 411.

An amendment made by order after the rendition of the verdict, by which the value of the property is increased, is not the subject of an exception. If there is an irregularity, it must be corrected by motion in the court below. *Diossy v. Morgan*, 74 N. Y. 11. The effect of a verdict in replevin where the defendant, by his answer, merely puts in issue the allegations of the complaint, is not necessarily conclusive that the plaintiff had no title to the property; it may have been found that the defendant did not wrongfully detain. Its effect, therefore, depends upon extrinsic evidence. But where the property was taken from the defendant's possession and it is proved that title to the property was in fact the subject of the contest, the verdict for defendant is conclusive. *Angel v. Hollister*, 38 N. Y. 378. Wherever a plaintiff in a replevin suit is entitled, under the pleadings, to try the title to the property replevied, and in case he succeeds is entitled to a return of the goods, he is bound to try the title in such suit and take a judgment therein for a return or the value of the goods, and he cannot forego such remedy and seek redress in a cross-suit. *McKnight v. Dunlap*, 4 Barb. 36. If the complaint be dismissed for defect of proof, the defendant is entitled to judgment for value of the goods. *McCurdy v. Brown*, 1 Duer, 101. Where the unsuccessful party cannot secure a return of the chattel the damages are its value at the time of the trial. *N. Y. Guaranty, etc. Co. v. Flynn*, 55 N. Y. 653.

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Defendant contracted to transfer the possession of the title to goods to plaintiff upon payment of the price. After paying a portion of the price, plaintiff replevied the goods. The referee found the sum due the plaintiff upon the contract of sale and that the value of the goods exceeded that sum, but did not specify the value, and then rendered judgment for defendant for said amount, and if not paid or collected, that then the goods be delivered to the defendant and that he recover a sum equal to the interest on said amount due him, as damages for the taking and detention of the goods. *Held*, that the referee was not required by § 1727 to fix the value of the goods. *Kceny v. Swan*, 24 Week. Dig. 454, 2 St. Rep. 214. See authorities under previous section, and *Scaman v. Luce*, 23 Barb. 240; *Fitzhugh v. Winan*, 9 N. Y. 559; *Townsend v. Bary*, 57 N. Y. 665; *Allen v. Judson*, 71 N. Y. 77. These decisions are not clear as to whether the rule laid down was confined to a case where plaintiff was general owner. This section confines the rule to litigation between the general and special owner.

Where the jury find for the plaintiff, as to the one part, and for the defendant, as to the other, designating the articles generically, without specifying them in detail, *held*, that it was competent for the court to render the verdict certain, by directing an amendment to the complaint, inserting therein a list of each class of articles intended by the generic designation of the verdict. *Emerson v. Bleakly*, 5 Abb. (N. S.) 350. In replevin against several defendants, where a taking by one defendant is fully proved, it is not a ground of nonsuit, as to all the defendants, that a joint taking is not proved. The court has power to adjudge a return of the goods in favor of such of the defendants as shall appear to be entitled to a return, and to refuse it as to others, although the jury may find the exclusive possession of the goods to be in one of the defendants. They are not bound to render a general verdict in favor of all the defendants. *Woodburn v. Chamberlain*, 17 Barb. 446.

Where plaintiff placed some machines in defendant's factory under an agreement by which at the expiration of a certain period the defendant had the option to return or buy the machines at a certain price, in an action of replevin, it was held that the measure of damages was the interest on the value of the machines from the time of their wrongful detention to the time of trial. *Red-*

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mond v. American Mfg. Co. 31 St. Rep. 573, 121 N. Y. 415, affirming 21 St. Rep. 476.

The value of the use of chattels during the time of the illegal detention is the proper measure of damages in case of replevy of a chattel where it has a value for use. *Commerce Exchange Nat. Bank v. Blye*, 56 Hun, 403. This case was reversed 123 N. Y. 132.

The value of the chattel required to be fixed in an action of replevin is the value at the time of trial, and not its value at the time of the demand. *Duffus v. Schwinger*, 79 Hun, 541, 61 St. Rep. 549, 29 Supp. 930.

Where the jury found for plaintiff, but failed to agree upon the amount of his damages, it was held that defendant could not complain of the action of the court in inserting nominal damages in the verdict. *Segelke v. Finan*, 1 Supp. 381; S. C., 15 Civ. Pro. R. 1. But see *Pakas v. Racy*, 13 Daly, 227, holding that if the verdict does not fix the value of the property at the time of the trial, the court cannot supply the omission.

In replevin the value of a chattel should be known and stated, since the depreciation in value without the defendant's fault is the owner's fault. *Hurd v. Birch*, 11 St. Rep. 870.

Where no requisition or affidavit is made and no proof of the facts required by §§ 1690 and 1695 is adduced, a verdict in the alternative is not requisite, but one for the value of the property may be rendered. *Wilsey v. Rooney*, 41 St. Rep. 444, 16 Supp. 471.

The successful party in replevin may recover possession with interest on the value of the property and amount of depreciation as damages for detention, or the value of its use if it has a usable value, but if there is no evidence or finding of depreciation and the only finding is as to value at the time of the trial, an allowance of damages for depreciation is error. *Crossley v. Hojer*, 11 Misc. 57, 63 St. Rep. 440, 31 Supp. 837.

Where the special interest of the defendant in the property sought to be replevied is greater than the value of the property, a finding of such value and judgment for return of the property or payment of its value, are not erroneous. *Thorn v. Witbeck*, 11 Misc. 171, 32 N. Y. Supp. 1088, 66 St. Rep. 543.

ARTICLE XI

CONTENTS OF JUDGMENT. §§ 1717, 1730.

§ 1717. Replevin papers to be made part of judgment-roll, etc.

The plaintiff's affidavit, with the accompanying requisition, and the return of the sheriff, must be made a part of the judgment-roll in the action; and a copy of each of them must be furnished to the court or the referee, upon the trial of an issue of fact, with a copy of the summons and of the pleadings.

§ 1730. Final judgment; docketing the same.

Final judgment for the plaintiff must award to him possession of the chattel recovered by him, with his damages, if any. If a chattel recovered was not replevied, or if, after it was replevied, it was delivered to the defendant, or to a person not a party, as prescribed in this article, the final judgment must also award to the plaintiff the sum fixed as the value thereof, to be paid by the defendant, if possession thereof is not delivered to the plaintiff. If the defendant has demanded judgment for the return of a chattel, which was replevied, and afterwards delivered to the plaintiff, or to a person not a party, as prescribed in this article, final judgment in his favor therefor must award to him possession thereof, with his damages, if any; and it must also award to him the sum fixed as the value thereof, to be paid by the plaintiff, if possession is not delivered to the defendant. But if the case is one of those specified in section 1727 of this act, final judgment in favor of the defendant must award to him the sum, fixed as therein specified, and if it is not collected, the delivery of the chattel; or, if the chattel has not been replevied, or has been returned to him after replevin, that he is entitled to possession thereof, until the sum so awarded is collected, or otherwise paid. The judgment may be docketed, and the docket thereof creates a lien, as if it was a judgment for the full amount of the money, including costs, which it awards, either absolutely or conditionally.

Judgment for value, instead of in the alternative, is amendable. *McLean v. Cole*, 13 Hun, 300. Where the property has been delivered to plaintiff, he cannot elect to take judgment for value. *Rockwell v. Saunders*, 19 Barb, 473. Erroneous judgment for value is to be corrected by motion, not by appeal. *Young v. Atwood*, 5 Hun, 234; *Ingersoll v. Bostwick*, 22 N. Y. 425. But the judgment having been for damages only, and not for the delivery of the property, the sheriff is not liable for such damages by reason of failure of sureties to justify on the undertaking; to render him liable there must be a judgment under which the property could be delivered. *Gallarati v. Orser*, 27 N. Y. 324. The defendant who succeeds in the action must take a judgment in the alternative for the return of the property or the value thereof, as assessed, in case a return cannot be had. *Dwight v. Enos*, 9 N. Y. 470; *Fitzhugh v. Winan*, 9 N. Y. 559; *Cochran v.*

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Gottwald, 41 Super. Ct. 317. See, however, *Glann v. Younglove*, 27 Barb. 480. Where part has been delivered, judgment should be for so much as has not been delivered, or its value. *Tracy v. Veeder*, 50 Barb. 70. The interest, since the verdict, should not be stated separately, but added to the verdict. *Munsell v. Flood*, 46 Super. Ct. 134. Where plaintiff claimed a special interest in property replevied by him as mortgagee, defendant being the general owner with the right to redeem, the proper judgment for plaintiff is for a return of the property or for its value, fixing it at the amount of the plaintiff's interest, that is, the amount due on the mortgage, not for the full value of the property, with damages for the detention. *Allen v. Judson*, 71 N. Y. 77. Where plaintiff obtained possession of the property, and the jury found it belonged jointly to him and to defendant, a judgment directing a return to defendant is proper, and in case of failure, for the full value of the property. *Walker v. Spring*, 5 Hun, 107; *Russell v. Allen*, 13 N. Y. 173. Where property taken by a tax collector is replevied, defendant is entitled to judgment for redelivery and damages for detention, even though the tax was illegally imposed, if the warrant was regular on its face. *Niagara Elevated R. R. Co. v. McNamara*, 2 Hun, 416. Where defendant denied being in possession of property, and it was delivered to plaintiff by the sheriff, *held*, that defendant was not entitled to a judgment for the return of the property, even though plaintiff could not recover it in the action. *Rawley v. Brown*, 11 Week. Dig. 454. A judgment in replevin should award the property to the plaintiff together with damages for its detention, and in case delivery of the property cannot be had, its value, as determined by the jury, in lieu thereof, and the judgment must be enforced by execution and not by punishment for contempt. A judgment in replevin may, undoubtedly, be entered, although the jury has not assessed any damages or found the value of the property. In that case the judgment would simply award the property to the plaintiff to be enforced by execution, and if the return of the property could not be thus obtained, the judgment would be unavailing. *Hammond v. Morgan*, 101 N. Y. 186.

A conclusion by a referee that plaintiff is entitled to recover the value of the property, while refusing to find that he is entitled to its possession, is erroneous. *Hoffman v. Markham*, 88 Hun, 18, 34 Supp. 508, 68 St. Rep. 292.

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On dismissal of an action of replevin, a defendant who is not entitled to return of the property to himself, cannot have judgment for its return to another defendant who has not demanded it. *Sheehan v. Golden*, 85 Hun. 462, 33 Supp. 109, 66 St. Rep. 711.

A judgment rendered upon the opening of plaintiff's counsel in a replevin action against a sheriff which shows that the action was prematurely brought, is not conclusive in a subsequent action to recover moneys paid in satisfaction of such judgment as proceeds of goods obtained from plaintiff by fraud. *Converse v. Sickels*, 146 N. Y. 200, 40 N. E. R. 777, 66 St. Rep. 586, reversing 74 Hun. 429, 26 Supp. 590, 57 St. Rep. 209.

Where plaintiff claimed the stock and fixtures of a beer saloon under a bill of sale from defendant, and the sheriff put a man in charge for six days allowing defendant access to the saloon, although he was not interfered with in making sales during that time, and defendant was thereafter left in possession, and defendant was found to be the owner of the property, it was held that the judgment should provide only for a dismissal of the complaint on the merits with costs, that a finding that the property was never returned to defendant was not sustained, that he was not entitled to damages for detention thereof. *Lindenkohl v. Weber*, 3 Misc. 27; 50 St. Rep. 575; 21 Supp. 1079.

An omission to render judgment in the alternative in an action of replevin is an irregularity which may be cured by modification on appeal. *Wolf v. Farley*, 40 St. Rep. 808.

Plaintiffs in an action of replevin can recover the value of such of the property as they cannot find and replevy. *Thompson v. Fuller*, 41 St. Rep. 224. Plaintiff is entitled, if successful in the action, to a judgment for possession. *Hay v. Muller*, 7 Misc. 670, 28 Supp. 57. Where defendant after pleading a denial and claim of title to one of the articles with a demand for judgment for the possession thereof or its value, makes an offer that the plaintiff have judgment for the possession of the other articles with costs, without reference to the one claimed by him, the judgment entered upon such offer is not an adjudication in his favor as to the title to such article. *Shepherd v. Mordhe*, 8 Misc. 607. Where plaintiffs recovered judgment for the possession only of a specific chattel, and execution was issued and returned without obtaining such possession, they are entitled to a manda-

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tory injunction directing defendant to deliver such property to them or to the sheriff. *Cain v. Cain*, 20 Supp. 45, 28 Abb. N. C. 423

ARTICLE XII.

EXECUTION. §§ 1731, 1732.

§ 1731. Execution; contents thereof.

An execution for the delivery of the possession of a chattel, and to satisfy, out of the property of the judgment debtor, a sum of money contingently awarded against him, must contain, in addition to the other matters prescribed by law the following directions:

1. Where the judgment is rendered in favor of the defendant, in a case specified in section 1727 of this act, the execution must require the sheriff to deliver possession of the chattel to the defendant, unless the plaintiff before the delivery, pays to him the sum of money awarded to the defendant, with interest and the sheriff's fees; and, in case the chattel cannot be found within his county, then to satisfy that sum out of the property of the plaintiff.

2. In any other case, where the judgment awards a sum of money, if possession of the chattel is not delivered to the prevailing party, the execution must require the sheriff, if the chattel cannot be found within his county, to satisfy the sum so awarded, with interest and his fees, out of the property of the party against whom the judgment is rendered.

A direction to satisfy a sum of money out of property, as prescribed in this section, must be in the form required by law for a like direction, where an execution against property is issued upon a judgment for a sum of money.

§ 1732. *Id.*; sheriff's power to take chattel.

For the purpose of taking possession of a chattel, by virtue of such an execution, the powers of the sheriff are the same as where he is required to replevy a chattel.

Section 1364, sub. 4, provides for an execution "for the delivery of the possession of a chattel, with or without damages, for the taking or detention thereof."

Under an execution in the usual form of replevin, it is the duty of the sheriff to take and deliver the property as commanded, not only if he finds it in possession of the person named in the process, but also if he finds it in the possession of any other person unless he can justify his refusal to do so by showing that such other person has a title or right of possession superior to that of the party to whom he is commanded to deliver it. Where, therefore, to such an execution the sheriff returned that he could not find the property so as to make delivery, and it appeared in an action against him for a false return that he knew where the property was within his county, and could have found it, but refused to take it, and to take any action in regard thereto, upon

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the sole ground that it was in the possession of a third party, *held*, that in the absence of proof that such third party had any title to the property or right of possession as against the plaintiff, the sheriff was liable. *Hoffman v. Conner*, 76 N. Y. 121.

Under an execution in replevin it is the duty of the sheriff to deliver the entire property called for or the entire damages; he cannot sever the quantity of chattels or the damages where all the chattels cannot be found. In such case the fact that the execution does not provide that damages shall be collected only in the alternative of failure to find the property, is immaterial. *Kingsley v. Sauer*, 17 Misc. 544.

Precedent for Execution in Replevin.

The People of the State of New York, to any Coroner of the County of Ulster, greeting:

Whereas judgment was rendered on the 24th day of August, 1885, in the Supreme Court, in an action between William M. Hayes and Peter Masten, plaintiffs, and William Webb, sheriff of Ulster county, defendant, in favor of the said William M. Hayes and Peter Masten, and against the said defendant William Webb, that the said plaintiffs recover of the said defendant the possession of (here describe the chattels and proceed with substance of judgment) as appears to us by the judgment-roll filed in the office of the clerk of the county of Ulster; and whereas the said judgment was duly docketed in the office of the clerk of the county of Ulster on the 26th day of August, 1885, at twelve o'clock noon of that day, and there is now actually due thereon the sum of \$125, with interest from the 24th day of August, 1885, for damages and costs, and \$400 additional with interest from said August 24, 1885, if a delivery of said property cannot be had; therefore, we command you to deliver the possession of said property to the said plaintiffs, and that you satisfy the said judgment for damages and costs, with interest as aforesaid, and also if said chattel cannot be found in your county to satisfy the further sum of \$400, the value of the property for which judgment was recovered, with interest as aforesaid out of the personal property of the said judgment debtor in your county, and if sufficient personal property cannot be found, then out of the real property in your county belonging to said judgment debtor at the time when the said judgment was so docketed in your county, or at any time thereafter in whose hands soever the same may be, and return this execution within sixty days after its receipt by you to the clerk of the county of Ulster.

Witness, Hon. Alton B. Parker, one of the justices of the
[L. s.] Supreme Court of the State of New York, at Kingston,
Ulster county, the 26th day of August, 1885.

JACOB D. WURTS,

Clerk.

R. BERNARD,
Plaintiff's Attorney.

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Indorsement on Execution for Specific Property.

Deliver possession of the property within described and collect \$125, with interest from the 24th day of August, 1885, and also if a delivery cannot be had, \$400, the value of the property for which judgment was recovered, besides your fees and poundage, and return this execution within sixty days after you receive the same to the clerk of the county of Ulster.

(Date.)

(Signature.)

ARTICLE XIII.

ACTION ON UNDERTAKING, WHEN MAINTAINABLE. §§ 1733, 1734, 1735.

§ 1733. Action on undertaking: when maintainable.

A plaintiff, who has recovered a final judgment, cannot maintain an action against the sureties in an undertaking, given in behalf of the defendant to procure a return of the chattel, or against the bail of a defendant, who has been arrested, until after the return, wholly or partly unsatisfied or unexecuted, of an execution in his favor for the delivery of the possession of the chattel, or to satisfy a sum of money out of the property of the defendant, or for both purposes, as the case requires. A defendant, who has recovered a final judgment, cannot maintain an action against the sureties in the plaintiff's undertaking, given to procure a replevin, until after a like return of a similar execution against the plaintiff.

§ 1734. Sheriff's return; evidence therein.

In such an action against the sureties, the sheriff's return to the execution is presumptive evidence of a failure to deliver, or to return a chattel, or to pay a sum of money, according to the terms of the undertaking.

§ 1735. Injury, etc. no defence.

It is not a defence to such an action that the chattel was injured or destroyed, after it was replevied, unless the injury or destruction was effected by the act, or with the consent of the plaintiff in the action, or occurred after the chattel was taken by virtue of the execution.

Before plaintiff, who has recovered a judgment in replevin for the possession of the property, with damages for its detention and a fixed sum in case a return cannot be had, can maintain an action against the sureties on an undertaking given by defendant, an execution on said judgment must be issued and returned unsatisfied. *Hager v. Clute*, 10 Hun, 447. See cases there discussed and distinguished. If the undertaking is made to plaintiff no assignment is necessary, nor is it a defence by the sureties that they failed to justify. *Decker v. Anderson*, 39 Barb. 346. Where, in an action in the corporate name, an undertaking is

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given to prevent delivery to plaintiff, the sureties cannot, in an action upon it, deny the corporate existence. *Loaners' Bank v. Jacoby*, 10 Hun, 143. In an action on an undertaking, plaintiff having prosecuted the suit as far as he could, the abatement of the action from other unavoidable causes is not a breach of the condition. *Pierce v. Hardee*, 1 T. & C. 557.

Where defendants undertook for the delivery of the property, if its return should be adjudged to plaintiff, and for the payment of any money recovered against defendant, and delivery had not been adjudged or claimed in the complaint, which was only for damages, *held*, complaint on the undertaking must be dismissed. *Jagger v. Lalanc & Grosjean Manf'g Co.* 8 Daly, 251. The sureties on an undertaking are liable to the claimant after the return of an execution unsatisfied on the judgment in replevin, where the action was against an assignor and general assignee, where it provides that the plaintiff is entitled to the delivery of the property, although the assignee have judgment for failure to prove demand. *Auerbach v. Marks*, 2 Week. Dig. 155. It is no answer in an action on an undertaking in replevin, after a return has been adjudged, that the property cannot then be reached. A stipulation that the property is in possession of defendants when the action commenced does not establish such possession at the termination of the action, and estop the defendants in an action on the undertaking. *Harrison v. Wilkin*, 78 N. Y. 390.

But where defendant gives an undertaking to retake the property from the sheriff, in which the taking at plaintiff's suit is recited and that the defendant denies its return, the latter, who thereby recovers the property, is estopped from denying that he had possession of the property at the commencement of the action. *Diossy v. Morgan*, 74 N. Y. 11. The complaint on an undertaking need not state that the bond was executed on behalf of plaintiffs in replevin; nor, on a bond to the coroner, need it state that the bond was given to the coroner. That fact will be presumed. *Shaw v. Tobias*, 3 N. Y. 188. The defendant, by giving a bond and retaking the goods, does not estop himself from the defence that when the action was commenced there had been no demand on or refusal by him, and, therefore, that no cause of action had accrued; *Church v. Frost*, 3 T. & C. 318; nor from showing the true amount of the goods taken by the sheriff and redelivered to him, especially if plaintiff's affidavit and the

Art. 13. Action on Undertaking when Maintainable.

recital to the undertaking are not sufficiently definite to show the actual value or to properly identify the quantity. *Talcott v. Belding*, 36 Super. Ct. 84. Where, by agreement, the formality of transfer by one of the parties to the other was omitted and it remained in the possession of the plaintiff, and defendant gave an undertaking reciting a claim for the delivery of the defendant's property, and undertaking that defendant should return the property to plaintiff in case delivery should be adjudged, and the defendant recovered judgment, *held*, the sureties to the undertaking were estopped from disputing its validity. *Harrison v. Utley*, 6 Hun, 565. Where a third person on behalf of plaintiff executes an undertaking and defendants obtain a judgment against plaintiff for costs, and on appeal that judgment is affirmed with costs, the two bills of costs are within the undertaking, which was for such payment as defendants should for any cause recover, and the obligor is liable therefor. *Tibbals v. O'Connor*, 28 Barb. 538.

In an action by an assignee of an undertaking it is sufficient to allege that the undertaking was duly assigned, without alleging that the judgment in the action was also assigned. *Morange v. Mudge*, 6 Abb. 243. In an action by the assignee where the undertaking is produced on the trial, a proper delivery of it to the promisee may be presumed. An assignment of the judgment, and of all moneys to be obtained by means thereof, or by any proceedings to be had thereon, under this section, transfers to the assignee any undertaking executed upon the requisition for the delivery of the property to the plaintiff. If the action is brought by only a portion of the original promisees, there is a defect of parties. *Bowdoin v. Colman*, 3 Abb. 481. Where an omission to aver delivery of the undertaking is excused after judgment, see *Robert v. Donnell*, 2 Daly, 64. As to when and on what terms an action on an undertaking can be awarded, see *Jagger v. Cunningham*, 8 Daly, 580. In an action against principals and sureties on an undertaking, a debt in favor of the principals cannot be set off. *Coffin v. McLean*, 7 Week. Dig. 436, affirmed, 80 N. Y. 560. It seems that it would be a good defence to an action on a bond that the plaintiff has possession of the property, and for that reason it is impossible, literally, to comply with the condition. *Barnett v. Selling*, 70 N. Y. 492. See *Hoffman v. Gortz*, 34 Hun, 239, for an instance where surety on an undertak-

Art. 14. Costs.

ing in replevin was allowed to prosecute an action brought by his principal, after the latter had abandoned it.

It is held in *O'Connell v. Kelly*, 15 Daly, 513, 29 St. Rep. 491, that an action on an undertaking in replevin for the return of goods will not lie where it is not shown that the sureties justified or that the undertaking was allowed by the court, or the property delivered under it; but in *Barton v. Donnelly*, 27 Supp. 525, 6 Misc. 473, 57 St. Rep. 701, it was held that the sureties on an undertaking given for the return of property in replevin are not relieved from liability by the mere fact that they failed to justify. Where property was returned by the sheriff to defendant under § 1704, and plaintiff obtained judgment for its return or its value and for the amount specified as damages for its detention, and defendant appealed from the judgment which was affirmed, and the property was returned to plaintiff, it was held that plaintiff could not maintain an action to recover damages for depreciation accruing during the period between the trial and the return of the property. *Corn Exchange Nat. Bank v. Blye*, 123 N. Y. 132, 33 St. Rep. 75, reversing 31 St. Rep. 469, 56 Hun, 403, 10 Supp. 151.

ARTICLE XIV.

COSTS.

The right of plaintiff to costs in replevin is regulated by subdivision 2 of § 3228, which gives costs to plaintiff in an action to recover a chattel. But if the value of the chattel, or of all the chattels, recovered by the plaintiff, as fixed, together with the damages, if any, awarded to him, is less than \$50, the amount of his costs cannot exceed the amount of the value and the damages. *Wilkins v. Williams*, 15 Civ. Pro. R. 168, 17 St. Rep. 238, 3 Supp. 897.

Where the verdict merely awards the property in question to the plaintiff without damages for its detention, and no proof is made on the trial as to the value of the property, plaintiff is not entitled to recover costs under Sub. 2, § 3228, of the Code. The design of that section is to compel plaintiff when he brings an action of replevin in the Supreme Court, to establish its value and damages to the amount of at least fifty dollars, as a condition to his recovery of the full bill of costs. *Herman v. Girvin*, 8 App. Div. 418.

Art. 14. Costs.

In replevin, if plaintiff recovers property exceeding \$50 in value, he is entitled to costs, notwithstanding defendant also recovers property exceeding that amount. *Stoddard v. Clark*, 9 Abb. (N. S.) 310; *Vowels v. Murray* 50 How. 159. Where defendant, before the retaking of the property under an equitable defence, tendered the amount he claimed to be due and kept his tender good, and on the trial plaintiff had a verdict for less than the sum tendered, *held*, plaintiff was not entitled to costs. *Archer v. Cole*, 22 How. 411. Where the verdict awarded plaintiff a chattel which had not been redelivered to defendant, the plaintiff is entitled to full costs, although the value of the chattel is not found. *Claffin v. Davidson*, 23 Week. Dig. 548.

Where the complaint in replevin contains but one count and the answer set up several defences, some covering the whole property, others applying only to a portion thereof, and both parties succeed as to part of the property replevied, the defendant is not entitled to costs. Section 1728 has no bearing upon that question; that was intended to enable the defendant to recover for the portion of the chattels replevied, although the plaintiff should recover for others, and authorizes such an amendment of the pleadings, as the rights of the parties require. It was not intended by that section to render the express requirements of § 3234 nugatory. *Newall Universal Mill Co. v. Muxlow*, 115 N. Y. 170, reversing 51 Hun, 453, approving *Kilburn v. Lowe*, 37 Hun, 237, and overruling *Ackerman v. De Lude*, 36 Hun, 44.

This case in the Court of Appeals was followed in *Mertens v. Fitzwater*, 53 Hun, 597, 6 Supp. 797, holding where the complaint in replevin states but one cause of action, though the claim is based on the right to rescind certain separate sales for fraud, and plaintiff has a verdict for part of the property only, with damages, the defendant is not entitled to costs. It is also held in *Ackerman v. O'Gorman*, 17 Civ. Pro. R. 275, that where the complaint contained but one cause of action, and the plaintiff was awarded part of the chattels sued for and the defendant the remainder, the defendant was not entitled to costs upon the authority of *Newall Universal Mill Co. v. Muxlow*, 115 N. Y. 170, *supra*, citing *Kilburn v. Lowe*, 37 Hun, 237.

It seems that defendant may by an offer of judgment throw upon plaintiff the responsibility for costs of an unsuccessful litiga-

tion as to any chattel described in the complaint. *Newall Universal Mill Co. v. Muxlow*, 115 N. Y. 171. A plaintiff in replevin cannot upon final recovery tax as a disbursement a sum paid by him to the surety company for furnishing the undertaking upon which the goods were seized. *Bick v. Reese*, 52 Hun, 125, 23 St. Rep. 404, 17 Civ. Pro. R. 110, 5 Supp. 121.

Where a sale of goods was sought to be avoided as fraudulent in an action of replevin, and the defendants after answering made a general assignment, and the assignee was never made a party to the action, nor did the property replevied ever come into his possession, and the action was tried and the defendant recovered judgment which was reversed on appeal it was *held*, plaintiffs failing to collect costs from defendant, obtained an order requiring the assignee to pay them from the moneys in his hands belonging to the assigned estate, that the assignee was not liable for costs, he having neither taken part in the defence of the action nor in any way interfered with the cause. *McCarthy v. Wright*, 56 Hun, 387. Where the recovery in an action of replevin is solely for a return of the property, the value of which is not fixed, the plaintiff is not entitled to costs. *Lockwood v. Waldorf*, 91 Hun, 281, 36 N. Y. Supp. 199, 70 St. Rep. 855.

CHAPTER XV.

ACTION TO FORECLOSE A LIEN UPON A CHATTEL.

SECTIONS OF THE CODE OF PROCEDURE AND WHERE FOUND IN THIS CHAPTER.

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§ 1737. Action; when and in what courts maintainable.

An action may be maintained to foreclose a lien upon a chattel for a sum of money, in any case where such a lien exists at the commencement of the action. The action may be brought in any court of record or not of record, which would have jurisdiction to render a judgment, in an action founded upon a contract, for a sum equal to the amount of the lien.

§ 1738. [Am'd, 1895.] Warrant to seize chattel; proceedings thereupon.

Where the action is brought in the supreme court, the city court of the city of New York, or a county court, if the plaintiff is not in possession of the chattel, a warrant may be granted by the court, or a judge thereof, commanding the sheriff to seize the chattel and safely keep it to abide the final judgment in the action. The provisions of title third of chapter seven of this act apply to such warrant, and to the proceedings to procure it, and after it has been issued, as if it was a warrant of attachment, except as otherwise expressly prescribed in this article.

§ 1739. Judgment.

In an action brought in a court specified in the last section, final judgment, in favor of the plaintiff, must specify the amount of the lien, and direct a sale of the chattel to satisfy the same and the costs, if any, by a referee appointed thereby, or an officer designated therein, in like manner as where a sheriff sells personal property by virtue of an execution; and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the amount of the lien, and the costs of the action. It must also provide for the payment of the surplus to the owner of the chattel, and for the safe keeping of the surplus, if necessary, until it is claimed by him. If a defendant, upon whom the summons is personally served, is liable for the amount of the lien, or for any part thereof, it may also award payment accordingly.

§ 1740. Action in inferior court.

Where the action is brought in a court, other than one of those specified in the last section but one, if the plaintiff is not in possession of the chattel, a warrant, commanding the proper officer to seize the chattel, and safely keep it to abide the judgment, may be issued in like manner as a warrant of attachment may be issued in an action founded upon a contract, brought in the same court; and the provisions of law, applicable to a warrant of attachment, issued

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out of that court, apply to a warrant, issued as prescribed in this section, and to the proceedings to procure it, and after it has been issued; except as otherwise specified in the judgment. A judgment in favor of the plaintiff, in such an action, must correspond to a judgment, rendered as prescribed in the last section, except that it must direct the sale of the chattel by an officer to whom an execution issued out of the court, may be directed, and the payment of the surplus, if its safe keeping is necessary, to the county treasurer, for the benefit of the owner.

§ 1741. Application of this article.

This article does not affect any existing right or remedy to foreclose or satisfy a lien upon a chattel, without action; and it does not apply to a case where another mode of enforcing a lien upon a chattel is specially prescribed by law.

This article is founded upon chapter 738 of Laws of 1869, and is intended to afford a simpler, cheaper, and more speedy method of foreclosing such a mortgage than an ordinary equitable action, and to be more beneficial in other cases of liens where the remedy is difficult and expensive, and the rights of the parties pursuing the same obscure. It also provides for cases not reached by the act of 1869, as well as omits a portion of that act (codifiers' notes). That an action in equity lies to foreclose a chattel mortgage was held in *Briggs v. Oliver*, 68 N. Y. 336, after the statute of 1869, and section 1741 seems to preserve fully that right.

Ostrander v. Weber, 114 N. Y. 95, was an action brought by the plaintiff alleging that he was the holder of a chattel mortgage covering a portion of the furniture and fixtures of a hotel, that one defendant was the holder of two junior mortgages covering portions of said property and some not covered by plaintiff's mortgage, another defendant held still another mortgage covering all of said property; that the sheriff, by virtue of a judgment and execution in favor of still another defendant against the person holding the property and carrying on the hotel, had levied upon said property and was proceeding to sell the same; that two of the defendants and the sheriff claimed their liens were prior to that of plaintiff's mortgage because of his omission to renew it by refileing; that the property if sold in bulk would produce enough to pay all the liens, but would bring much less if sold separately with the conflicting claims thereon; the complaint asked for the appointment of a receiver with authority to sell the property in bulk and distribute the proceeds under the direction of the court, and in accordance with the rights and priorities of the parties; it was held, per Potter, J., that the complaint set forth several sub-

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jects of equitable jurisdiction, among others the foreclosure of chattel mortgages, citing *Briggs v. Oliver*, 68 N. Y. 336; *Hart v. Ten Eyck*, 2 Johns. Ch. 99; *Thompson v. Van Vechton*, 5 Duer, 624; *Charter v. Stevens*, 3 Den. 33, and held the action well brought.

The provisions of § 1737 do not apply to mere choses in action such as notice or demands placed in the petitioner's hands for collection. *Matter of Wilson*, 2 Civ. Pro. R. 343. The provision of § 1737 is applicable to the foreclosure of a lien under the provisions of chapter 458 of the Laws of 1887, as amended by chapter 457 of the Laws of 1888, being an act to create a lien for services of a stallion. *Tuttle v. Dennis*, 58 Hun, 35, 33 St. Rep. 445. In *Englehart Co. v. Benjamin*, 5 App. Div. 477, it was held that the plaintiff in that particular case had not alleged sufficient facts to constitute any cause of action whatever.

An instrument which recited that for value received the maker sold and assigned the articles named to another person, his heirs and assigns, the maker to hold and retain possession of the property for eight months from the time of sale, and providing that if during that time the indebtedness of the third party should be paid or satisfied, the conveyance should be null and void, was held to be a chattel mortgage and that an action would lie for its foreclosure. *Blake v. Corbet*, 31 St. Rep. 31, affirming 12 St. Rep. 650.

A warrant of seizure may be granted in cases of foreclosure of a lien upon a chattel where the chattel is not in possession of the plaintiff who has the lien. The provision that the proceedings shall be similar to those in cases of attachment was not intended to require the affidavit to state that the claim is above all counterclaims. *Blake v. Crowley*, 8 St. Rep. 796. Where a warrant was issued pursuant to the provisions of § 1738, and the sheriff, pursuant to the warrant, which was regular on its face, took the chattel from the actual possession of a person not a party to the action, who claimed to be and was, in fact, the owner thereof, *held*, that such a person could, after a demand for the chattel and refusal of the sheriff to restore it, maintain an action against him to recover the chattel so taken. *Carpenter v. Lott*, 31 Hun, 348.

The provision contained in § 1738, that the provisions of title 3d of chapter 7th of this act apply to the warrant and proceedings to procure it after it has been issued, as if it were a warrant

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for attachment, etc., was not intended to require the affidavit upon which the motion for the warrant is made, to state that the claim is due over and above any claims known to the defendant, as is required by § 636. *Blake v. Corbet*, 44 Hun, 344.

Complaint.

SUPREME COURT — ULSTER COUNTY.

GEORGE DUMOND

agst.

GEORGE ROBINSON, ISAAC ANDERSON
AND JOHN ROUND, CONSTABLE.

The plaintiff herein shows to the court, that heretofore, and on the 3d day of November, 1885, one George Robinson, the owner of the chattels therein described, made, executed, and delivered to one George O'Kelly, an instrument in writing, of which the following is a copy:

"To all to whom these presents shall come, Know Ye, That I, George Robinson, of Shandaken, county of Ulster, and State of New York, am indebted unto George O'Kelly, of Hardenburgh, county of Ulster, and State of New York, in the sum of one hundred and twenty-five dollars, being for the purchase price of one pair of cattle. Now for securing the payment of said debt and the interest from the date hereof, to the said George O'Kelly, I do hereby sell, transfer and assign to the said George O'Kelly, the property described in the following schedule, viz.: One pair four-year-old brindle steers, being the same pair this day purchased of said O'Kelly; one light-red large cow, seven years old; one yearling heifer, a line back; said property now being and remaining in the possession of said George Robinson: Provided always, and this mortgage is on the express condition that if the said George Robinson shall pay to the said George O'Kelly, his assigns or representatives, the sum of one hundred and twenty-five dollars, with interest thereon, as follows: On or before the first day of April next, which the said George Robinson hereby covenants to pay, then this transfer to be void and of no effect; but in case of non-payment of the said debt and interest at the time above mentioned, then the said George O'Kelly shall have full power to enter upon the premises of said party of the first part, or any other place or places where the goods and chattels aforesaid may be; to take possession of said property; to sell the same at public or private sale, and the avails (after deducting all expenses of the sale and keeping of the said property) to apply in payment of the above debt, and in case the said George O'Kelly shall at any time deem said property or debt unsafe, it shall be lawful for him to take possession of such property, and to sell the same at public or private sale, previous to the time

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above mentioned, for the payment of said debt, applying the proceeds as aforesaid, after deducting all expenses of the sale and keeping of the said property. And the said mortgagee, his representatives or assigns, may purchase at any such sale, in the same manner, and to the same effect, as a person not interested herein. If from any cause said property shall fail to satisfy said debt, interest, and costs and charges, I covenant and agree to pay the deficiency.

" In witness whereof, I have hereunto set my hand and seal the third day of November, in the year of our Lord one thousand eight hundred and eighty-five.

" GEORGE ROBINSON. [L. S.]

" Sealed and delivered in the presence of

" DEWITT GRIFFIN."

That said mortgage was duly filed in the town clerk's office of the town of Shandaken, where the defendant resided at the time of the execution, and filing thereof on the 5th day of November, 1886, and where said chattels were situated at the time of such execution and filing; that the said instrument was duly sold, transferred and assigned to this plaintiff, by the said Kelly, on the 19th day of April, 1886, and he is now the holder and owner thereof; that the sum secured by said mortgage is due and payable, and that the same remains unpaid, and there is now due and secured by said mortgage the sum of \$125, with interest thereon from the 3d day of November, 1885; that the defendant Robinson has caused a pair of oxen described in said mortgage to be removed from said town of Shandaken, and the said property is now claimed to be owned by the defendant Isaac Anderson, who has refused to deliver the same to the possession of this plaintiff, although the possession thereof has been demanded from him; that the defendant Round, claiming to act on behalf of the defendant Anderson, now has and retains possession of said oxen described in the said mortgage, and refuses to deliver the possession of the same to this plaintiff, although plaintiff has demanded possession thereof from said defendant. Wherefore plaintiff demands judgment for the foreclosure of said mortgage, and sale of the chattels therein described by a proper person to be designated by the court, and that the proceeds be applied to the payment of the amount due plaintiff and the costs of the action, and that plaintiff have judgment against defendant Anderson for any costs which may accrue in the action which cannot be satisfied out of the fund realized from the sale of said chattels after first paying plaintiff the amount due him and secured thereby.

BERNARD & FIERO,
Plaintiff's Attorneys.

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Bond.

SUPREME COURT — ULSTER COUNTY.

GEORGE DUMOND

*agst.*GEORGE ROBINSON, ISAAC ANDERSON
AND JOHN ROUND, CONSTABLE.

Whereas, the above-named George Dumond, as plaintiff, has commenced, or is about to commence, an action by summons for the foreclosure of a lien on a chattel against the above-named defendants, and has made, or is about to make, application for a warrant, to seize such chattels, described in the complaint, according to the provisions of the Code of Procedure:

Now, therefore, we, George Young, of Wawarsing, by occupation a paper manufacturer, and Charles Brodhead, of the city of Kingston, by occupation a deputy sheriff, do hereby jointly and severally undertake, promise and agree to and with the said defendants, that if the defendants recover judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to said defendants, and all damages which they may sustain by reason of the said warrant, not exceeding \$250.

Dated *April 22*, 1886.CHARLES BRODHEAD,
GEO. YOUNG.

Affidavit for Warrant.

(Title as before.)

ULSTER COUNTY, ss.:

George Dumond, of the city of Kingston, being duly sworn, says, that he is the owner and holder of a chattel mortgage given by George Robinson to George O'Kelly on November 3, 1885, and filed in the town clerk's office of the town of Shandaken, where said Anderson then resided and where the chattels therein described were then located, on the 5th day of November, 1885, for the purpose of securing the payment of the sum of \$125, with interest thereon on the first day of April, 1886; that the property pledged in and by said mortgage consists of one pair four-year-old brindle steers, one light-red large cow seven years old, one yearling heifer, a line back; that the whole of said sum is due, with interest thereon, and remains unpaid, and this deponent has brought this action to foreclose the lien of said mortgage; that the pair of oxen described in said mortgage are now in the possession of the defendants, Isaac Anderson and John Round, the said Anderson claiming to be the owner thereof and the said John Round claiming to be entitled to the possession thereof, and both said defendants refuse to deliver the possession of the said oxen to this plaintiff; that the said defendants,

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Anderson and John Round, reside at the town of Union Vale, in the county of Dutchess, and said oxen are at said town of Union Vale in said county.

(Jurat.)

GEORGE W. DUMOND.

Warrant.

The People of the State of New York to the Sheriff of the County of Dutchess:

Whereas, in an action brought in this court, an application has been made to the justice granting this warrant, by George Dumond, plaintiff, for a warrant to seize and safely keep the chattels hereinafter described, to abide the final judgment in said action in which George Dumond is plaintiff, George Robinson, Isaac Anderson and John Round, constable, are defendants. And it appearing by affidavit to the satisfaction of the justice granting this warrant, that a cause of action, such as is specified in section 1737 of the Code of Civil Procedure, exists in favor of the plaintiff and against the defendants, to foreclose a lien for the sum of \$125, with interest thereon from November 3, 1885, upon said chattels, and that the plaintiff is not in possession of said chattels, and the plaintiff having given the undertaking required by law: Now you are hereby commanded to seize the following chattels, to wit: One pair four-year-old brindle steers, being a part of the chattels described in the complaint in this action, or so much thereof as may be found in your county, and to safely keep the same to abide the final judgment in the action, and that you proceed herein in the manner and make your return within the time required of you by law.

Given under the hand of one of the justices of the Supreme [L. S.] Court at the chambers in the city of Kingston this day of April, 1886.

BERNARD & FIERO,
Plaintiff's Attorneys.

A. B. PARKER,
Justice Supreme Court.

JACOB D. WURTS,
Clerk Supreme Court in and for Ulster county.

The complaint in *Ostrander v. Weber* is given as a precedent for an action for a receiver where chattel mortgage is held by plaintiff and complicated questions arise as to the rights of both prior and subsequent lienors. It may readily, by change in the prayer for relief, be more closely adapted to foreclosure of a chattel mortgage which it was in its present form held to substantially be on appeal.

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Precedent for Complaint.

SUPREME COURT — ULSTER COUNTY.

James E. Ostrander

agst.

John Weber, Horace Humphrey, Robert Loughran, Joseph H. Riseley, as Sheriff of Ulster County, Emma Brigham, Daniel O'Connell and Oliver H. Brigham.

114 N. Y. 95.

The plaintiff herein respectfully shows to this court:

First. That heretofore and on or about the 8th day of January, 1883, the defendants Emma Brigham and Daniel O'Connell, constituting the firm of Brigham & O'Connell, doing business at the city of Kingston, made, executed and delivered to one John D. Sleight a certain chattel mortgage on personal property then and now at the hotel known as the Mansion House, in said city, a copy of which is hereto annexed and marked Schedule "A."

That thereafter and on or about February 22, 1883, the said John D. Sleight made and executed an assignment of said mortgage to this plaintiff as and for security for a certain indorsement made by him of notes of said Brigham and O'Connell given to the said Sleight for the purchase price of the said property so mortgaged and for renewals thereof, a copy of which is hereto annexed and marked schedule "A. 2."

That the plaintiff on December 16, 1883, indorsed a renewal note of said Brigham and O'Connell, so secured by said assignment, at three months, which note became due at the State of New York National Bank on March 19, 1883, and was protested for non-payment, and this plaintiff has been obliged to pay the same and is now the owner and holder thereof, and that by the terms of said assignment he is entitled to all the rights and benefits accruing or belonging to the holder of said chattel mortgage and to enforce the same to the amount so paid by him with interest thereon.

That the defendant, the State of New York National Bank, holds two notes made by said Brigham and O'Connell as part of the purchase price of said furniture, and, as this plaintiff is advised and believes, protected by said mortgage, such notes aggregating the sum of about \$200. The said notes represent all the liabilities secured by said mortgage. That said mortgage was duly renewed on January 29th, 1884, and has not since been renewed.

Second. That on the 12th day of February, 1885, the defendant Oliver H. Brigham, who had become the purchaser of the personal property formerly owned by the firm of Brigham and O'Connell, including the property described in Exhibit "A," made and executed a chattel mortgage on certain of the property so acquired, including a part or the whole of the property covered by Exhibit

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"A" to the defendant John Weber to secure certain liabilities, contingent or otherwise, on the part of said Brigham to said Weber, a copy of which said mortgage is hereto annexed and marked Schedule "B," which said mortgage was delivered to said Weber and filed in Ulster county clerk's office on the 13th day of February, 1885. That said mortgage was taken by said defendant Weber to secure a precedent debt, and he parted with no value therefor; that the defendant Weber well knew of the existence of this mortgage now held by this plaintiff, and that a large sum remained unpaid thereon, and that by its terms said mortgage was expressly made subject to the mortgage held by plaintiff, and that the same is subject and second to the said mortgage, Exhibit "A," and that plaintiff is entitled to be first paid the amount of said claim out of the proceeds of the property covered by said Exhibit "A."

That said Weber claims that his said mortgage is a prior lien and entitled to be paid before the mortgage held by plaintiff, for the reason that said plaintiff's mortgage was not filed before January 29th, 1885, and claims it is to be first paid out of the proceeds of the property.

Third. That on the 17th day of January, 1885, the defendant Loughran obtained a judgment against defendant Oliver H. Brigham, in Supreme Court, Ulster county, for the sum of \$613.89, and issued execution thereon to the sheriff of Ulster county, and defendant Riseley, on the 7th day of March, 1885, and the said sheriff on the 16th day of March, 1885, levied on a portion or the whole of the property covered by the said Exhibits A and B and also on certain property covered by a mortgage held by one Horace Humphrey, hereinafter set forth, and is about to proceed to sell the same to make the amount of said execution.

That as to the claim of priority made by said sheriff, this plaintiff is not advised now as to the manner of sale or the nature or extent of the lien claimed for said levy.

Fourth. That on or about the 12th day of April, 1884, and the 27th day of May, 1884, the said firm of Brigham and O'Connell, they then being owners of the property made, executed and delivered two certain chattel mortgages to the defendant Horace Humphrey, to secure him from liability as therein set forth, a copy of which mortgages are annexed and marked Schedules "C" and "D" respectively.

That such mortgage covers a portion of the property mentioned and described in the said Weber mortgage and a portion of the property levied on under the judgment held by defendant Loughran.

That said Humphrey threatens to take possession of said property under and by virtue of his said mortgage.

Fifth. That the said property covered by said mortgages and levy consists of hotel furniture and fixtures of the hotel known as the Mansion House, at Rondout, in the city of Kingston. That much of the value of the said property depends upon the business of the hotel, and the property is of much greater value as a whole located on the premises in connection with the lease and business of the hotel than if sold separately. That the defendant Oliver H. Brigham is willing and desirous of disposing of the lease and good will of the

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business, in case a purchaser can be had. That the property is of sufficient value to pay all the liens above set forth, in case it can be sold in bulk to remain in the hotel, and will, as this plaintiff verily believes, satisfy all liens upon it. That this plaintiff is informed and believes that a purchaser can be had for the property in case a good title, free from incumbrances, can be given for all the furniture and fixtures, all of which are covered by one or more of the liens herein-before set forth.

That in case the property is seized and sold under the different liens, this plaintiff is advised and verily believes that by reason of claim of priority raising difficult questions of law, persons desiring the property will be unwilling to bid and the property is likely to be sacrificed, and this plaintiff's claim, secured by his said mortgage, lost in whole or in part.

That, as this plaintiff is informed and believes, it will, by reason of the claim as to priority, be unsafe for the parties interested to bid with reference to their own liens, for their protection, thus preventing the property from bringing its value or a fair proportion thereof.

Wherefore, this plaintiff asks that all further proceedings on the part of persons holding liens on the said property to enforce their said liens, be stayed pending the appointment of a receiver of said property, and that a receiver of said property be appointed and directed by this court to operate and manage the same, until a sale can be made advantageous to this plaintiff and the other parties thereto, and that a sale of said property be made at an early day, free and clear from the liens herein set forth, and the moneys realized be paid into court by the receiver, and the rights of the parties thereto determined by the court, and the proceeds distributed according to the priorities of the several liens and the rights of the parties, and that the plaintiff have costs of this action out of the said fund, and that he have such other and further relief as may be just and equitable.

BERNARD & FIERO,
Attorneys for Plaintiffs.

CHAPTER XVI.

ACTION TO ANNUL A VOID OR VOIDABLE MARRIAGE.

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ARTICLE I.

GENERAL PROVISIONS AS TO ACTION. §§ 1742, 1743, 1755. LAWS 1896, CHAP. 272, §§ 2, 3, 4.

§ 1742. [Am'd, 1887.] Action by woman, married under 16, to annul marriage.

An action may be maintained, by the woman, to procure a judgment, declaring a marriage contract void, and annulling the marriage under the following circumstances:

Art. 1. General Provisions as to Action.

1. Where the plaintiff had not attained the age of sixteen years at the time of the marriage.

2. Where the marriage took place without the consent of her father, mother, guardian, or other person having the legal charge of her person.

3. Where it was not followed by consummation or cohabitation, and was not ratified by any mutual assent of the parties, after the plaintiff attained the age of sixteen years.

§ 1743. In what other cases marriage may be annulled.

An action may also be maintained to procure a judgment, declaring a marriage contract void and annulling the marriage for either of the following causes, existing at the time of the marriage:

1. That one or both of the parties had not attained the age of legal consent.

2. That the former husband or wife of one of the parties was living, and that the marriage with the former husband or wife was then in force.

3. That one of the parties was an idiot or a lunatic.

4. That the consent of one of the parties was obtained by force, duress or fraud.

5. That one of the parties was physically incapable of entering into the marriage state. But an action can be maintained, under this subdivision, only where the incapacity continues and is incurable.

§ 1755. How next friend of infant, lunatic, etc., allowed to sue, etc.

An order, allowing a person to maintain an action, as the next friend of an infant, as prescribed in section 1744 of this act, or as the next friend of an idiot or lunatic, as prescribed in section 1748 of this act, may be granted by the court in its discretion, without notice or upon notice to such persons and in such a manner as it deems proper. A motion to vacate such an order must be made at a term held by the judge who granted it, unless he is dead, out of office, or unable to hear it by reason of sickness or otherwise; or unless he expressly directs it to be heard at a term held by another judge. But where such an order has been granted, the court, to which application for final judgment is made, may dismiss the complaint, if justice so requires, although, in a like case, the party to the marriage, if plaintiff, would be entitled to judgment.

Sections 2, 3 and 4 of chapter 272, Laws of 1896, read as follows:

§ 2. Incestuous and void marriages.

A marriage is incestuous and void whether the relatives are legitimate or illegitimate between, either:

1. An ancestor and a descendent, or

2. A brother and sister of either the whole or the half blood.

3. An uncle and niece or an aunt and nephew.

§ 3. Void marriages.

A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person;

2. Such former husband or wife has been finally sentenced to imprisonment for life;

ART. 1. General Provisions as to Action.

3. Such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time.

§ 4. Voidable marriages.

A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is eighteen years.
2. Is incapable of consenting to a marriage for want of understanding.
3. Is incapable of entering into the married state from physical cause.
4. Consents to such marriage by reason of force, duress or fraud; or,
5. Has a husband or wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time.

Actions to annul a void or voidable marriage may be brought only as provided in the Code of Civil Procedure.*

The Code and statute seem very much mixed to the casual reader, but as the statute has just been revised, it must be assumed the revisers considered the provisions of the Code and *intended* to simplify the law on the subject.

The court has power to grant a decree of nullity only in cases provided by statute. It cannot decree a marriage null on the ground that one of the parties married in another State in violation of a decree in this State. *Penquat v. Phelps*, 48 Barb. 566. See *Kerrison v. Kerrison*, 8 Abb. N. C. 444. When the prayer of the complaint is for separation, and there is no general prayer for relief, the plaintiff cannot, on demurrer, have a decree adjudging the marriage void, though there are sufficient allegations to that effect in the complaint. *Walton v. Walton*, 32 Barb. 203. The courts are confined to the exercise of such express or incidental powers as are conferred on them by statute relating to divorce. *Burtis v. Burtis*, Hopk. 457; *Erkenbrack v. Erkenbrack*, 96 N. Y. 456; *Wells v. Wells*, 10 St. Rep. 248. A judgment dissolving the marriage was recovered by the wife against her husband. *Held*, that it disabled the husband from prosecuting an action, brought by himself, against her. *Jones v. Jones*, 36 Hun, 414.

* Note to the above sections in the original bill presented by the revisers is as follows:

The word "duress" is inserted in the fourth subdivision in accordance with section 1743 of the Code of Civil Procedure. The age of legal consent to marriage is raised to eighteen years in the case of females, to conform to 282 of the Penal Code, as amended by Laws 1895, chapter 460, which makes it abduction to marry a woman under eighteen years of age without the consent of her parents. See Civil Code, section 1742. Sections 1742, 1744 and 1745 of the Code of Civil Procedure prescribe at whose instance and under what circumstances an action to annul a marriage may be brought.

 Art. 2. Marriage Annulled on Ground of Infancy.

An action to set aside a void or voidable marriage cannot be maintained after the death of one of the parties. The subject of divorce is exclusively regulated by statute, and actions relating thereto can only be maintained pursuant to statutory provisions. *Combs v. Combs*, 17 Abb. N. C. 265, citing *Cropsy v. McKinney*, 30 Barb. 47, 55; *Griffin v. Banks*, 24 Hun, 213.

At the suit of his wife plaintiff was divorced and married again; pending a decree by his second wife for divorce, the decree divorcing him from his former wife was, at her instance, annulled *ab initio*, which he sought to set up by amended or supplemental answer as a defence to the action by his second wife, but was refused leave to file either answer for that purpose; *held*, such refusal was no ground to enjoin the action by the second wife. *Von Prochazka v. Von Prochazka*, 21 St. Rep. 309.

A marriage may be annulled for causes existing before or at the time it was entered into and the decree in such case destroys the conjugal relation *ab initio* and operates as a sentence of nullity. Such a judgment operates from the date of the decree only and has no retroactive effect except as expressly provided by statute. *Van Cleef v. Burns*, 118 N. Y. 552, citing *Wait v. Wait*, 4 N. Y. 95.

The judgment of nullity may, in certain cases, declare the marriage void *ab initio*; in other cases the marriage is only voidable and does not become void until sentence of nullity is pronounced upon it (citing *Valleau v. Valleau*, 6 Paige, 208; *Cropsy v. McKinney*, 30 Barb. 47). *Blott v. Rider*, 47 How. 94. As to the granting of alimony in an action to annul a marriage, see "Alimony," chap. XIX.

ARTICLE II

MARRIAGE ANNULLED ON GROUND OF INFANCY. § 1744.

§ 1744. Action when party was under the age of consent.

An action to annul a marriage, on the ground that one of the parties had not attained the age of legal consent, may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person, as the next friend of the infant. But a marriage shall not be annulled, at the suit of a party who was of the age of legal consent when it was contracted, or where it appears that the parties, for any time after they attained that age, freely cohabited as husband and wife.

Aside from the statutory regulations limiting the age of consent to marriage, the rules of the common law remain unchanged, and

Art. 3. When Voidable, Former Husband or Wife Living.

after the infant arrives at the age fixed by statute, as that at which they may marry, the consent of the parents is not necessary to the validity of the marriage. *Bennett v. Smith*, 21 Barb. 440. In *Aymar v. Roff*, 3 Johns. Ch. 49, where a man was married to an infant under the age of legal consent, and she immediately declared her ignorance of the nature and consequences of the marriage, and her dissent from it, the court, on a bill filed, ordered her to be placed under protection as a ward of the court, and forbade all intercourse or correspondence with her, by the defendant, under pain of contempt. A very obvious way, says Mr. Bishop, vol. 1, § 151, citing *Coleman's Cases*, and City Hall Recorder, of confirming the marriage, is by continuing to cohabit, or by sexual intercourse.

ARTICLE III.

WHEN VOIDABLE, FORMER HUSBAND OR WIFE LIVING.

§ 1745.

§ 1745. [Am'd, 1882.] Id. ; when former husband or wife was living.

An action to annul a marriage, upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, may be maintained by either of the parties during the lifetime of the other, or by the former husband or wife. Where it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or wife was dead, or without any knowledge on the part of the innocent party of such former marriage, the issue of the subsequent marriage, born or begotten before the final judgment, are deemed for all purposes the legitimate children of the parent who at the time of the marriage was competent to contract, and are entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of said parent; and the issue so entitled must be specified in the judgment, and the innocent party must be awarded their custody, and he or she is entitled to appoint a guardian of their persons by will.

This section shall be construed to extend to all cases where the judgment or decree of nullity of such subsequent marriage is rendered after the passage of this act, whether such subsequent marriage was contracted before or after the passage hereof.

Where after a husband had been absent five successive years, during which the wife heard nothing from him, and she, in good faith, supposing him to be dead, married another man, such marriage is voidable and not void, and cannot be so adjudged at the instance of any third party. *Cropsey v. McKinney*, 30 Barb. 47.

In *Griffin v. Banks*, 24 How. 213, it was held that in such case the first marriage only temporarily suspended the rights of the

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husband, and he having omitted to file a bill to annul the second marriage, the latter continued in effect as if when first solemnized the husband was not alive. This case was reversed on another point. 37 N. Y. 621. Where a marriage has been dissolved on account of adultery by the husband he cannot contract a valid second marriage during the life of the former wife; to render the second marriage void it is enough that there was a prior marriage, and that the former wife was living at the time of the second marriage. It is not material that the former marriage should have taken place or been dissolved within the State. *Smith v. Woodworth*, 44 Barb. 198. Where it is undenied that at the time of the marriage the wife had another living husband, a judgment of nullity must follow. *Appleton v. Warner*, 51 Barb. 270. A husband who seeks a judgment declaring his marriage void by reason of a former marriage of his wife, cannot attack a divorce obtained by her from her former husband, alleging that it was obtained by fraud and collusion, if the court had jurisdiction. *Ruger v. Ruger*, 21 Hun, 489, affirmed, 85 N. Y. 483. But a marriage was annulled in *Mellen v. Mellen*, 10 Abb. N. C. 329, on a second wife's suit, upon the ground that a divorce obtained in another State was without jurisdiction.

A marriage will not be annulled because contracted in violation of a former decree of divorce forbidding remarriage. *Kerrison v. Kerrison*, 60 How. 51. A second marriage, contracted in good faith after the other party has been absent five years, is voidable merely, and is considered void only from the time it is so decreed. *Valleau v. Valleau*, 6 Paige, 207. A party forbidden from marrying again by decree, who takes up his abode in another State, may marry again if no fraud or evasion be shown, and such marriage is to be treated as valid in the courts of this State. *Matter of Webb's Estate*, 1 Tucker, 372. Parties interested in the estate of a deceased, who allege that testator's marriage with one claiming to be his widow was void because she had a previous husband living, may be allowed to intervene in an action brought by her to have her first marriage declared void. *Tilley v. Hayes*, 27 Hun, 251. Where a husband has procured a judgment divorcing him from his wife, and forbidding her to marry again, a marriage contracted by her, even under the circumstances prescribed in the statute, authorizing the marriage of one whose husband or wife has absented himself or herself for the space of five years, etc., is void,

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and its invalidity may be urged by the heirs at law and next of kin of the second husband after his death. *Matter of Barrowdale*, 28 Hun, 336. In a husband's action to annul a marriage on the ground that, when it was contracted, he had a wife living, allegations in the answer that before marrying defendant, plaintiff had procured a divorce from a second wife, giving him liberty to marry again, and she had married him in good faith, are immaterial, and may be stricken out. *Anonymous*, 15 Abb. (N. S.) 171.

Where a man's wife has absented herself for the space of five years and he afterwards marries again, when, in fact, his former wife is living, the second marriage becomes void only from the time that it is so declared by a competent tribunal. *Gall v. Gall*, 22 St. Rep. 746, reversing 12 St. Rep. 604.

Under this section of the statute, a marriage, during the lifetime of the husband or wife, is not to be regarded as valid for any other purpose, concerning property, than that of preserving the inheritance of the offspring thereof, from the competent parent. *Spicer v. Spicer*, 16 Abb. (N. S.) 112. In an action for divorce, brought by a husband against his second wife on the ground that he had a first wife living at the time of the second marriage, he obtained a divorce by her failure to defend; the second wife was subsequently allowed to open the judgment on the ground of fraud, and to put in an answer alleging the validity of the second marriage. The third wife then obtained leave of the court to intervene, and she put in an answer insisting on the invalidity of the second marriage and the validity of hers, the third. *Held*, that without an amendment to the complaint, the court could not adjudge both the second and third marriages void. *Anonymous*, 15 Abb. (N. S.) 171. The provisions of the statute cited have no application to the case of persons who, having previously been husband and wife, have been divorced and have consequently ceased to be such any longer. Where a husband has procured a judgment divorcing him from his wife, and forbidding her to marry, a marriage contracted by her, even under the circumstances prescribed by the statute, may be contested by the heirs-at-law and next of kin of the second husband after his death. *Matter of Barrowdale*, 28 Hun, 336. Parties interested in the estate of a deceased person, who allege that testator's marriage, with one claiming to be his widow, was void, because she had a previous husband living, may be allowed to intervene in an action brought

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by her to have her first marriage declared void. *Tilby v. Hayes*, 27 Hun, 251.

Where a husband absents himself for the space of five years, and his wife marries in good faith, supposing him to be dead, her second marriage will be void only from the time it is so pronounced by a court of competent jurisdiction, and it can only be declared void on the application of one of the parties to it during the life-time of the other. It cannot be declared void, collaterally, after the death of the first husband, in actions instituted by creditors. *Cropsey v. McKinney*, 30 Bar. 47. It was said in *Lincoln v. Lincoln*, 6 Robt. 525, that a marriage could not be annulled on the ground that defendant had a living husband at the time of the marriage, if it be shown that the alleged prior husband had another wife living at the time of the alleged prior marriage; such facts rendered the alleged prior marriage void *ab initio*, and a decree dissolving it is not necessary to enable defendant to marry again; but in *Wightman v. Wightman*, 4 Johns. Ch. 343, it is held that though a marriage be, *ipso facto*, void, yet it is proper that it be declared void by a judicial decision of a proper tribunal.

Where a marriage has been annulled by a judicial decree upon the ground that when it was contracted the husband had a former wife living, who had absented herself for more than five successive years immediately preceding the second marriage, without being known by him to be living, although until it was so annulled it was voidable only and not void, and the cohabitation of the parties was not adulterous, and although both parties entered into the marriage in entire good faith, yet the wife is not entitled to dower in the real estate owned by her husband at the date of the decree, distinguishing *Wait v. Wait*, 4 N. Y. 95; *Jones v. Zoller*, 29 Hun, 551; 32 Hun, 280, 37 Hun, 228, 104 N. Y. 218; *Brewer v. Bowers*, 1 Abb. Ct. App. Dec. 214; *Griffin v. Banks*, 37 N. Y. 621, reversing *Price v. Price*, 33 Hun, 76.

Although after the first wife is discovered to be living, continued cohabitation under a second marriage contracted under the provisions of 2 Revised Statutes, 139, § 6, 8th ed., vol. 4, p. 2596, providing that a second marriage contracted in good faith, where the former husband or wife has absented himself or herself for five successive years without being known to the other party to be living, shall be void only from the time its nullity shall be decreed, will furnish to the first wife no ground for divorce until the

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second marriage is annulled, yet such cohabitation is improper upon moral grounds, and where it has been indulged in, neither party upon the annulment of the second marriage can be regarded as an innocent party, entitled to the custody of the children, but in such case the court may award their custody to either parent as the interest of the children requires. *Safford v. Safford*, 31 Abb. N. C. 73.

Precedent for Complaint — Former Husband Living.

SUPREME COURT — ULSTER COUNTY.

WILLIAM H. STEWART

agst.

ANNIE STEWART.

The complaint of the above plaintiff respectfully shows to this court that the above plaintiff married the above defendant at the city of Kingston, Ulster county, New York, on the 2d day of July, 1879; that both the said plaintiff and defendant were then inhabitants and residents of said county of Ulster, and the said plaintiff has ever since been and is now an inhabitant and resident of said county; that the said plaintiff and defendant lived together as husband and wife from the time of said marriage down to sometime in the spring of the year 1882, at and in the county of Ulster; that the issue of said marriage of the said plaintiff and defendant were two children, William H. Stewart, born April 13, 1880, and now living with his grandfather at Hurley, Ulster county, and Frederick Stewart, born December 26, 1881, and now deceased; that prior to the marriage of the said defendant to this plaintiff the said defendant had been the wife of one Charles Tate and had, as this plaintiff is informed and believes, commenced proceedings in the High Court of Justice in England, to procure a divorce from said Charles Tate, and that such proceedings had been had in said action that a decree had been entered in said action, of which the following is a copy:

IN THE HIGH COURT OF JUSTICE — DIVORCE DIVISION.

Before the Right Honorable Sir James Hammond, Knight, the President sitting in open court at Westminster.
Tate v. Tate.

Referring to the decree made in this action on the 5th day of March, 1879, whereby it was decreed that the marriage had and solemnized on the 18th day of February, 1876, at the parish church in the Parish of St. John's, Middlebrough, in the county of York, between Annie Tate, then Towers, widow, the petitioner, and Charles Tate, the respondent, be dissolved by reason of the adultery, coupled with cruelty toward the petitioner, committed by respondent

Art. 3. When Voidable, Former Husband or Wife Living.

since the celebration of the said marriage, unless sufficient cause be shown to the court why the said decree should not be made absolute within six months from the making thereof, and no such cause having been shown, the president, on motion of counsel for the said petitioner, by his final decree, pronounced and declared the said marriage to be dissolved.

(Signed)

DAVID HENRY OWEN,
Registrar.

The complaint further shows that the said plaintiff supposed at the time of his said marriage with the defendant, that the defendant was fully divorced from her former marriage and could legally enter into the marriage relation with this plaintiff, and the said plaintiff is informed that the said defendant then supposed that she had been fully divorced from her former marriage and could legally enter into the marriage relation with this plaintiff; that the plaintiff and defendant lived together as husband and wife, plaintiff supposing himself to have been legally married to her, until the spring of 1882; and this plaintiff is informed and believes that the said defendant lived with the plaintiff, as his wife, supposing herself to be his lawful wife, until the spring of 1882, when she received letters from England advising her that her said divorce from said Charles Tate had not become absolute at the time of her said marriage to this plaintiff, and she, therefore, then first knew that there was any question as to this plaintiff's marriage with the said defendant being lawful; the complaint further shows that in the spring of 1882 the said defendant informed this plaintiff that there was some question as to the legality of their said marriage by reason of her divorce from Charles Tate not having become absolute at the time of such marriage, and suggesting that they be remarried; that this plaintiff, not understanding such statement and not then believing the same, refused to enter into such remarriage, and that they then separated and have not since lived together as man and wife; that this plaintiff and said defendant have not lived or cohabited together as man and wife since this plaintiff learned of and heard that there was any question as to the legality of said marriage; that the said child, William Henry Stewart, has, since such separation, been under the care and control of this plaintiff; that soon after said separation the said defendant removed to the Province of Ontario, Canada, and has since continued to reside there; that, as this plaintiff is informed and believes, the said defendant, on September 20, 1884, at South Hampton, Province of Ontario, married one Isaac Aves, and has since continued to live and cohabit with him as his wife at Burgoin and Stratford, in said Province of Ontario, until August, 1886; that said defendant committed adultery with the said Isaac Aves at various times, between the said 20th day of September, 1884, and August, 1886, at the places above named, and at the house and residence of the said Aves, and lived with him in adulterous intercourse; that such adultery was committed without the connivance, privity or procurement of this plaintiff; that five years have not elapsed since the plaintiff discovered the fact of such adultery, or since the commencement of such adulterous intercourse

Art. 4. When Annulled for Idiocy or Lunacy.

was discovered by this plaintiff, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery or since such adultery as aforesaid:

Wherefore, the said plaintiff demands the judgment of this court:

First. Whether or not this plaintiff and the said defendant ever became husband and wife;

Second. If the court finds they did become husband and wife, then this plaintiff demands judgment that the bonds of matrimony between this plaintiff and said defendant be dissolved;

Third. That the custody of the said child, William Henry Stewart, be awarded to this plaintiff.

R. BERNARD,
Plaintiff's Attorney.

ARTICLE IV.

WHEN ANNULLED FOR IDIOCY OR LUNACY. §§ 1746, 1747,
1748, 1749.§ 1746. *Id.*: where party was an idiot.

An action to annul a marriage, on the ground that one of the parties thereto was an idiot, may be maintained, at any time during the lifetime of either party, by any relative of the idiot, who has an interest to avoid the marriage.

§ 1747. *Id.*: where party was a lunatic.

An action to annul a marriage, on the ground that one of the parties thereto was a lunatic, may be maintained, at any time during the continuance of the lunacy, or, after the death of the lunatic, in that condition, and during the life of the other party to the marriage, by any relative of the lunatic, who has an interest to avoid the marriage. Such an action may also be maintained by the lunatic, at any time after restoration to a sound mind; but in that case the marriage should not be annulled, if it appears that the parties freely cohabited as husband and wife after the lunatic was restored to a sound mind.

§ 1748. *Action by next friend of idiot or lunatic.*

Where no relative of the idiot or lunatic brings an action to annul the marriage, as prescribed in either of the last two sections, the court may allow an action for that purpose to be maintained, at any time during the lifetime of both the parties to the marriage, by any person as the next friend of the idiot or lunatic. But this section does not apply, where the marriage might have been annulled, at the suit of the lunatic, as prescribed in the last section.

See *Montgomery v. Montgomery*, 3 Barb. Ch. 132.

§ 1749. *Issue; when entitled to succeed, etc.*

A child of a marriage, which is annulled on the ground of the idiocy or lunacy of one of its parents, is deemed for all purposes, the legitimate child of the parent who is of sound mind.

An insane person, or one so deranged as not to understand the ordinary affairs of life, is incompetent to marry. Without mental

Art. 5. When Voidable for Force, Duress, or Fraud.

capacity to give consent there can be no valid marriage. The party must, however, be insane at the time of the contract or ceremony, otherwise it will be held valid. If the person was only temporarily insane, and afterward, during a lucid interval, consents to the union, the marriage will be confirmed and valid. Lloyd on Divorce, 21. Marriage was decreed void because party was insane at time of marriage, in *Wrightman v. Wrightman*, 4 Johns. Ch. 343. See authorities there cited. The insanity of a plaintiff at the time of the commencement of an action for divorce is not an issuable fact. *Appleton v. Warner*, 51 Barb. 270.

In an action to annul a marriage on the ground of the lunacy of the husband, it appeared that two days after the marriage an inquisition was found, declaring the husband to be of unsound mind, and that he had been for six months previous; the wife at the time of the marriage had notice of the pendency of the proceedings in lunacy. *Held*, that such finding was only presumptive evidence of insanity previous to the marriage, and the court in the action having found the husband of sound mind at the time of the marriage, which finding was affirmed at General Term, it was conclusive on appeal to the Court of Appeals. The presumption is always one of sanity. *Banker v. Banker*, 63 N. Y. 409.

To maintain an action to annul a marriage on the ground that defendant is a lunatic, it must appear that such cause existed at the time of the marriage. *Forman v. Forman*, 53 St. Rep. 639, 24 Supp. 117.

ARTICLE V.

WHEN VOIDABLE FOR FORCE, DURESS, OR FRAUD.

§§ 1750, 1751.

§ 1750. Action on the ground of force, fraud, etc.

An action to annul a marriage, on the ground that the consent of one of the parties thereto was obtained by force, duress, or fraud, may be maintained, at any time, by the party whose consent was so obtained. Such an action may also be maintained, during the lifetime of the other party, by the parent or the guardian of the person of the party, whose consent was so obtained, or by any relative of that party, who has an interest to avoid the marriage. But a marriage shall not be annulled on the ground of force or duress, if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud.

Art. 5. When Voidable for Force, Duress, or Fraud.

§ 1751. Custody, maintenance, etc., of issue of such a marriage.

The court must, upon the application of the plaintiff, award the custody of the children of a marriage, which is annulled on the ground of force, duress, or fraud, to the innocent parent, unless it appears that the latter is unfit, for any reason, to have the custody of one or more of the children, in which case the court must give such directions relating thereto as the interests of the child or children require. The judgment may make provision for the education and maintenance of the children out of the property of the guilty parent.

The jurisdiction of the court to annul a marriage on the ground of fraud is not derived from statute, but arises from inherent jurisdiction of the Court of Chancery to set aside any contract into which one of the parties has been induced to enter by fraud. The fraud, to induce a court to set aside a contract of marriage, is different from that which would be sufficient in ordinary cases, and no fraud will avoid a marriage which does not go to the very essence of the contract, and is not in its nature such a thing as would prevent the party either from entering into the marriage relation or as, after the party has entered into the relation, would preclude him or her from the performance of the duties which the law and custom imposes upon a party to such a contract. The fact that a husband supposed that his wife had not, at the time when he married her, ever been married, when she had formerly been married to a person from whom she procured a valid divorce, is insufficient to support an action to annul a marriage. *Fisk v. Fisk*, 6 App. Div. 432.

A decree of nullity for fraud was granted before the statute and independently of it. *Ferlat v. Gojohn*, Hopk. Ch. 478; *Burtis v. Burtis*, Hopk. Ch. 557. Marriage with the mother of a bastard, obtained on the wife's statement that he was the father of the child, when she knew that it was impossible, is ground for adjudging the marriage void — the child had subsequently been born and was colored. *Scott v. Shufeldt*, 5 Paige, 43. Marriage set aside for fraud and legal incapacity. *Perry v. Perry*, 2 Paige, 501. The fraud referred to is not one as to the character or property of the defendant. *Klein v. Wolfsohn*, 1 Abb. N. C. 134. But a marriage procured by deception as to the health and marriageable condition of defendant was declared void. *Meyer v. Meyer*, 41 How. 311. Where it appeared that the consent of a minor female was obtained by fraud, a sentence of nullity was pronounced at the suit of the mother, both husband and wife having been made parties. *Sloan v. Kane*, 10 How. 66. Marriage

Art. 5. When Voidable for Force, Duress, or Fraud.

was set aside as procured by spiritualism. *Hides v. Hides*, 65 How. 17.

A suit to annul a marriage upon the ground of fraud could not be maintained after six years, before the Revised Statutes. *Montgomery v. Montgomery*, 3 Barb. Ch. 132. But see § 1750. But the suit cannot be maintained upon the mere admission of the defendant. 3 Barb. Ch. 132, *supra*. The man's ignorance of the woman's pregnancy at the time of marrying, without positive concealment by her, is not a ground for annulling the marriage. *Barth v. Barth*, 5 Law Bull. 87. A husband is not entitled to a decree of nullity upon the ground that the former husband of his wife obtained a divorce from her by collusion, and that the plaintiff married her on the faith of the representation that she had procured a valid divorce from her former husband. *Kinnier v. Kinnier*, 53 Barb. 454. In an action to annul a marriage on the ground that plaintiff's former wife was living, it is no defence that representations were made to him that he had a legal right to marry, but it is a good defence that the former wife was not living at the time of suit brought. *Price v. Price*, 2 T. & C. 659. Representations that a former wife was dead, when, in fact, she was living, but her husband had been divorced from her, is held in *Clarke v. Clarke*, 11 Abb. 228, not to constitute such fraud as to be a ground for declaring his second marriage void. But see *Blossom v. Barrett*, 37 N. Y. 434, where it was held that a defendant, who has, by false representations, procured a marriage between plaintiff and himself, when, by law, he was not competent to enter into the marriage contract, is liable to her in damages, and that where by statute such marriage is void, the plaintiff may maintain an action against such fraudulent husband without first procuring a formal annulment of the contract. A husband cannot allege, as a ground for annulling his marriage, that his wife made false representations to him, whereby he was induced to marry her, when he otherwise would not have done so, when, during cohabitation, he discovered the falsity of such representations, yet continued to cohabit with her two years after such discovery. *Muller v. Muller*, 21 Week. Dig. 287.

False representations to a school girl fifteen years of age, inducing her to consent to a marriage ceremony; to the effect that her parents knew of the purpose, and would not object; that she need not live with him for several years, but the ceremony could

 Art. 5. When Voidable for Force, Duress, or Fraud.

be kept secret, she, by reason of immaturity or mental weakness, not understanding the nature of the contract, are sufficient grounds for declaring the marriage void. *Moot v. Moot*, 37 Hun, 288.

Where plaintiff was married to defendant, who at the time was a young man enjoying a good reputation, an investigation made prior to the marriage disclosed nothing against his character, and was arrested a few months after a marriage for obtaining money under false pretences, and it appeared that plaintiff left him on learning some of these facts and did not thereafter cohabit with him, held that the circumstances constituted a fraud on plaintiff by defendant in procuring her consent to the marriage within the meaning of subd. 4 of § 1743, and that the marriage should be annulled upon that ground. *King v. Brewer*, 8 Misc. 587, 60 St. Rep. 692, 29 Supp. 1114, 31 Abb. N. C. 325.

In an action to annul a marriage on the ground that a divorce procured by defendant from a former wife was void, it appeared that the decree of divorce was granted in Massachusetts where the former marriage was not contracted, where the defendant was not domiciled, nor served with process there or appeared; *held*, decree based on service by publication was void in New York and the second marriage should be annulled; *held*, however, that the decree could not be impeached for fraud for proceeding upon a ground not recognized here, nor for error in deciding that the plaintiff in the action was a resident of Massachusetts. *Davis v. Davis*, 2 Misc. 549, 51 St. Rep. 509, 22 Supp. 191.

A judgment annulling a marriage on the ground of duress of the husband by threats of the wife's brother, and fear of violence at the hands of her father, was affirmed in *Anderson v. Anderson*, 74 Hun, 56, 57 St. Rep. 868, 26 Supp. 492, 147 N. Y. 719.

The fact concealed from a husband that the wife before marriage had given birth to an illegitimate child does not, in itself, constitute such fraud as will authorize an annulment of the marriage. *Shrady v. Logan*, 17 Misc. 329.

A representation by a woman that she is a maiden, when in fact, she is a widow or divorced with legal capacity to marry, is not such a fraud as to authorize the annulment of the marriage. *Fisk v. Fisk*, 12 Misc. 466, 34 Supp. 33, 67 St. Rep. 834, 25 Civ. Pro. 38, s. c. 1 N. Y. Ann. C. 380, s. c. 6 App. Div. 432.

Where defendant by fraudulently representing himself as an honest industrious man, induced plaintiff, a young woman, to

Art. 6. Action on Ground of Physical Incapacity.

marry him, when he was, in fact, a notorious and professional thief and since committed to prison, was held ground for annulling the marriage for fraud. *Keyes v. Keyes*, 6 Misc. 355, 26 Supp. 910.

A marriage will not be annulled on the ground that plaintiff was induced to contract it by reason of a false representation that defendant was pregnant by him. *Tait v. Tait*, 3 Misc. 218; 52 St. Rep. 645; 23 Supp. 597.

Complaint Alleging Fraud and Duress.

SUPREME COURT — KINGS COUNTY.

EDWARD A. ANDERSON

agst.

ANNA ANDERSON.

147 N. Y. 719.

The complaint of the plaintiff respectfully shows to this court:

1. That on the 18th day of October, 1883, at the city of Brooklyn, the defendant was married to the plaintiff by the Rev. Father Guerin.

2. That the consent of the plaintiff was obtained to the said marriage by force and duress in that said plaintiff was made to believe that if he did not marry the said defendant, the brother of said defendant would shoot and kill him, the said plaintiff, and that serious violence would be committed upon him by defendant's father, and the said defendant's brother threatened to kill said plaintiff if he did not marry the defendant, which threats were made with the knowledge and concurrence of the defendant. That in the fear that said threats would be carried out and that plaintiff would be killed or grievously wounded and hurt if he did not, the said plaintiff married the defendant to avoid such hurt or death.

3. Said plaintiff and defendant have never since the said marriage cohabited together as husband and wife.

Wherefore said plaintiff demands judgment that the aforesaid marriage be annulled and declared void, and that each of the parties be freed from the obligations thereof and for such other relief as may be just.

CHAS. J. PATTERSON,
Plaintiff's Attorney.

ARTICLE VI.

ACTION ON GROUND OF PHYSICAL INCAPACITY. § 1752.

§ 1752. [Am'd, 1895.] Action on the ground of physical incapacity.

An action to annul a marriage, on the ground that one of the parties was physically incapable of entering into the marriage state, may be maintained by the injured party against the party whose incapacity is alleged; or such an action may be maintained by the party who was incapable against the other party,

 Art. 6. Action on Ground of Physical Incapacity.

provided the incapable party was unaware of the incapacity at the time of marriage, or if aware of such incapacity, did not know it was incurable. Such an action must be commenced before five years have expired since the marriage.

A marriage will not be declared void for impotence of one of the parties, unless such incapacity existed at the time of the marriage, and is incurable, and the court may order an examination. *Devanbagh v. Devanbagh*, 5 Paige, 554. If there is reason to believe the incapacity can be removed by an operation, a decree of nullity cannot be granted, though the wife refuses to submit to the operation. *Devanbagh v. Devanbagh*, 6 Paige, 175.

The court cannot decree a divorce for impotence except under the statute. *Burtis v. Burtis*, Hopk. 557. And sterility is not a ground for divorce. 5 Paige, 554, *supra*. In a suit for nullity on ground of physical incapacity, resulting from disease, a compulsory reference cannot be made; that only can be done under the statute when the incapacity is congenit^{al}. *Morrell v. Morrell*, 17 Hun, 324. See 9 Abb. N. C. 187 for note on impotency.

In action for divorce, on the ground of adultery, the defendant cannot interpose the defence of the physical incapacity of the plaintiff to contract the marriage relation, where more than two years have expired from the solemnization of the marriage contract, and within which time the defendant has brought no action against the plaintiff for a dissolution of the marriage contract on that ground. *Griffin v. Griffin*, 23 How. 183. This is a statute of limitation, and the action is not barred by the lapse of two years, unless that objection is set up in the answer. *Kaiser v. Kaiser*, 16 Hun, 602. See, however, language of present section.

An action to annul a marriage brought by the husband on the ground of physical disability of the wife, held to have been properly dismissed, there having been issue born of the marriage. *Riley v. Riley*, 73 Hun, 575, 57 St. Rep. 270, 26 Supp. 164.

It was held in *Allen v. Allen*, 8 Abb. N. C. 175, that alimony and counsel fee will be granted to the wife in an action against her husband, on the ground of his physical incapacity to enter into the marriage state, not following *Bartlett v. Bartlett*, Clark Ch. 322. This case is followed by a very full and elaborate note on divorce for impotence, giving very fully the history of the law, and citing numerous authorities both as to the law and the practice.

Art. 7. Order for Jury Trial and Judgment, how Obtained, Effect of Judgment

ARTICLE VII.

ORDER FOR JURY TRIAL AND JUDGMENT, HOW OBTAINED AND
EFFECT OF JUDGMENT, §§ 1753, 1754. RULE 73.**§ 1753. Certain proceedings regulated in action to annul marriage.**

In an action brought as prescribed in this article, a final judgment, annulling the marriage, shall not be rendered by default, for want of an appearance or pleading, or upon the trial of an issue, without proof of the facts, upon which the allegation of nullity is founded. And the declaration or confession of either party to the marriage is not alone sufficient as proof; but other satisfactory evidence of the facts must be produced. In such an action, except where it is founded upon an allegation of the physical incapacity of one of the parties thereto, the court must, upon the application of either of the parties, make an order directing the trial, by a jury, of all the issues of fact; or it may, of its own motion, make an order directing the trial, by a jury, of one or more issues of fact; for which purpose, the questions to be tried must be prepared and settled as prescribed in section 970 of this act.

§ 1754. Judgment annulling a marriage; how far conclusive.

A final judgment, annulling a marriage, rendered during the lifetime of both the parties, is conclusive evidence of the invalidity of the marriage in every court of record or not of record, in any action or special proceeding, civil or criminal. Such a judgment, rendered after the death of either party to the marriage, is conclusive only as against the parties to the action, and those claiming under them.

Rule 73. Judgment by default, when granted, etc.

Before judgment by default shall be granted in an action to annul a marriage on the ground that the party was under the age of legal consent, proof must be made showing that the parties thereto have not freely cohabited for any time as husband and wife, after the plaintiff had attained the age of consent. If the action is brought to annul the marriage, on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show that there has been no voluntary cohabitation between the parties as man and wife; and if it is brought to annul a marriage on the ground that the plaintiff was a lunatic, proof must be produced showing that the lunacy still continues; or that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

In an action to annul a marriage, judgment shall not be granted on default without proof of the facts upon which the allegations of nullity are founded. In such an action proof should be competent, clear and convincing, and where it is not, judgment will be refused and the case sent back to the referee for further proof.
Chambers v. Chambers, 24 Civ. Pro. R. 187.

Art. 7. Order for Jury Trial and Judgment, how Obtained, Effect of Judgment.

Judgment Annulling Marriage — Former Husband Living.
SUPREME COURT.

WILLIAM H. STEWART

agst.

ANNIE STEWART.

The above cause being at issue and coming on for trial, by consent of the parties thereto, before the court without a jury, and the court having heard the proofs and allegations of the parties, has made and filed its decision, whereby it finds that there was no legal marriage between the parties to this action, because at the time of such marriage the said defendant had a former husband living, and that such marriage had no legal force or effect. Now, on motion of Reuben Bernard, the attorney for the above plaintiff, it is hereby ordered and adjudged that the marriage between the parties to this action on July 2, 1879, was and is of no legal force or effect, and was not a legal marriage because the said defendant then had a husband living from whom she was not divorced; and it is further adjudged that the said plaintiff did not become and is not now the husband of said defendant, and that the said defendant did not become and is not now the wife of this plaintiff. And it is further adjudged that the said plaintiff have the care, custody, control and education of the infant, William Henry Stewart, the issue of said marriage.

SAMUEL EDWARDS,

Justice Supreme Court.

JACOB D. WURTS,

Clerk.

For the practice in actions of this character, see § 1757, where the authorities are cited and practice in all actions for divorce is considered.

Judgment Annulling Marriage on Ground of Fraud and Duress.

At a Special Term of the Supreme Court held at the Court House in the city of Brooklyn in and for the County of Kings, on the 14th day of February, 1893.

Present — Hon. Edgar M. Cullen, *Justice*.

EDWARD A. ANDERSON

agst.

ANNA ANDERSON.

147 N. Y. 719.

This action having been tried at a Special Term of this court upon the issues joined in the complaint and the answer, and the court

Art. 7. Order for Jury Trial and Judgment, how Certified, Effect of Judgment.

having heard and considered the proofs offered by the parties and having thereafter duly made and filed a decision in writing separately stating the matters of fact and law decided in favor of the plaintiff without costs, directing the annulling of the marriage existing between the plaintiff and defendant.

Now, on motion of Charles J. Patterson, attorney for plaintiff, and after hearing George G. Reynolds, Esq., attorney for defendant, it is

Adjudged, ordered and decreed, that the marriage contract between the plaintiff Edward A. Anderson and the defendant Anna Anderson be and the same is hereby declared, void and that the said marriage between the said plaintiff and said defendant is hereby annulled and the said parties are free from the obligations of the marriage with each other. No costs awarded to either party.

A copy.

JOHN COTTIER,
Clerk.

CHAPTER XVII.

DIVORCE.*

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ARTICLE I.

WHEN AND HOW ACTION MAINTAINED. §§ 1756, 1758.

§ 1756. In what cases action may be maintained.

In either of the following cases a husband or a wife may maintain an action against the other party to the marriage to procure a judgment, divorcing the parties and dissolving the marriage by reason of the defendant's adultery:

1. Where both parties were residents of the State, when the offence was committed.
2. Where the parties were married within this State.
3. Where the plaintiff was a resident of the State, when the offence was committed, and is a resident thereof, when the action is commenced.
4. Where the offence was committed within the State, and the injured party, when the action is commenced, is a resident of the State.

§ 1758. When divorce denied, although adultery proved.

In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

1. Where the offence was committed by the procurement or with the connivance of the plaintiff.

* Bishop on Marriage and Divorce is a leading authority on this subject. Other works on the subject are Browne's Digest of Divorce and Alimony, Hirsh's Digest of the Divorce Laws of the United States, Woolsey on Divorce and Divorce Legislation, Newell on Marriage and Divorce.

 Art. 1. When and How Action Maintained.

2. Where the offence charged has been forgiven by the plaintiff. The forgiveness may be proved, either affirmatively, or by the voluntary cohabitation of the parties, with the knowledge of the fact.

3. Where there has been no express forgiveness and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery by the plaintiff of the offence charged.

4. Where the plaintiff has also been guilty of adultery, under such circumstances, that the defendant would have been entitled, if innocent, to a divorce.

The relation of two named persons does not depend on their will, but it is a status, a legal condition established by law, and thus the State can, on any terms it pleases, dissolve the marriage of any persons over whom it has jurisdiction. *Am. & Eng. Ency. of Law*, vol. 5, p. 746. Adultery in divorce law is the voluntary sexual intercourse of a married person with one not the husband or wife. *Bishop on Divorce*, § 703. The ecclesiastical law of England in relation to divorce forms no part of the law of this State. *Jones v. Jones*, 90 Hun, 414, 35 N. Y. Supp. 877, 70 St. Rep. 319.

The courts have not common-law jurisdiction over the subject of divorce; their authority is confined altogether to the exercise of such express and incidental powers as are conferred upon them by statute. *Griffin v. Griffin*, 47 N. Y. 134; *Davis v. Davis*, 75 N. Y. 221; *Erkenbrack v. Erkenbrack*, 96 N. Y. 456. Plaintiff cannot have a divorce where she was married abroad, and also lived abroad at the time of the commencement of the action. *Ramsden v. Ramsden*, 28 Hun, 285, affirmed, 91 N. Y. 281. Where the marriage is solemnized abroad, the statute requires that the injured party shall be an actual inhabitant of the State at the time of the commencement of the offence and when suit was begun. *Otto v. Otto*, 8 Week. Dig. 413. Where defendant was a non-resident at the time of the adultery, and committed it out of the State, the other party cannot obtain a divorce unless he was an actual inhabitant when the offence was committed and when suit was begun; a coming temporarily in the State to bring suit and then departing does not make him an inhabitant. *McNeel v. McNeel*, 3 Edw. 550.

Where in divorce an order of publication is obtained on an affidavit that defendant's domicile was originally in this State, and that he never intended or expressed an intention to acquire a residence elsewhere, and these statements were not contradicted, *held*, the court was justified in holding him a resident. *De Meli v.*

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De Meli, 5 Civ. Pro. R. 306. Where the adultery was committed in New York, during the residence of the parties there, and the defendant resided there at the time of commencement of suit, *held*, the Superior Court had jurisdiction. *Forest v. Forest*, 6 Duer, 102. If the bill does not show upon its face that it is within the provisions of the statute, plaintiff cannot have a divorce, even though the defendant does not demur. *Farvis v. Farvis*, 3 Edw. Ch. 462. Where it appeared in the wife's suit that her husband came into the State a short time before filing the bill, and that he had continued to reside there since that time, it was held that she was presumed to be a resident at the time of the filing of the bill. *Johnson v. Johnson*, 4 Paige, 460. The domicile of the husband is, *prima facie*, that of the wife; but if separated by decree of a competent court, and the wife remains in the same place, that presumption is rebutted. *Vischer v. Vischer*, 12 Barb. 640; *Glinzmann v. Glinzmann*, 12 How. 32. The courts of this State have jurisdiction to grant a decree of divorce in favor of a non-resident defendant. *Fullmer v. Fullmer*, 6 Week. Dig. 42. Every State has a right to determine the status of persons domiciled within its territory, which right includes the power to decree a divorce, which must be recognized as effecting a dissolution of the marriage contract in sister States; jurisdiction of the person of a domiciled citizen of a State may be acquired by the courts of that State, by substituted service as authorized by the *lex fori*, though at the time he be in fact abiding in another State. *Hunt v. Hunt*, 72 N. Y. 217. Where the plaintiff prior to her marriage with defendant procured a divorce from a former husband, in another State, it is incumbent on plaintiff to show that such divorce is valid and that the court granting it had jurisdiction of the person of the defendant in such former action. *Collins v. Collins*, 80 N. Y. 1.

Judgments of Superior Courts are presumed to have been regularly and legally rendered, and where the record does not disclose how the court acquired jurisdiction, it will be presumed till the contrary appears. *Wells v. Wells*, 10 St. Rep. 248. Where plaintiff and her husband were residents of Massachusetts, she went to Vermont and procured a divorce for abandonment, service of some papers was admitted by the husband, in Massachusetts, who waived all irregularities in the service, subsequently married the defendant in this State, and afterward brought action for

Art. 1. When and How Action Maintained.

divorce on the ground that the divorce granted in Vermont was a nullity. *Held*, that the cause of action in the former suit not having accrued while the parties were domiciled in Vermont, the courts of that State acquired no jurisdiction; that the service outside the State was a nullity, and the answer set forth a good defence. *Moe v. Moc*, 2 T. & C. 647. The subject of divorce is regulated exclusively by statute, and actions relating thereto can only be maintained pursuant to statutory provisions. *Combs v. Combs*, 17 Abb. N. C. 265, citing *Blott v. Rider*, 47 How. 90; *Sullivan v. Sullivan*, 41 Super. Ct. 519. No jurisdiction is acquired by personal service of the process of a court, on persons residing out of a State, unless such service is expressly authorized by statute. *Burton v. Burton*, 45 Hun, 68. It was held in *Yenney v. Yenney*, 1 Civ. Pro. R. 146, n., that in divorce cases the applicant must be, at the time of exhibiting the bill of complaint, an actual inhabitant of this State, and that the affidavit merely alleging residence does not give jurisdiction to authorize an order for service on defendant by publication.

Service must be such as fairly to advise the defendant of the commencement of the action, otherwise it will be regarded as a fraudulent or unfair use of the process of the court, and judgment on such service will be set aside on motion. *Bulkley v. Bulkley*, 6 Abb. 307.

Where the complaint in an action for divorce brought by the wife alleged that the parties were married in this State and the plaintiff resided here, the summons was served here and the defendant appeared and answered denying commission of the offences charged in the complaint, as a separate defence alleged that both parties were at all the times mentioned in the complaint residents of the State of Pennsylvania and that the courts of this State had no jurisdiction; to this plaintiff demurred as upon its face insufficient; upon the pleadings and other proof, which warranted a finding that the parties before the commencement of the action had separated and that plaintiff was then a resident of this State as defined by § 1763, an order was granted directing the payment of counsel fees and alimony; *held*, that the court had power to make the order; that even if the fact of residence in another State was to be deemed settled by the demurrer, the legal effect of the fact presented an issue of law which defendant had no absolute right to have decided upon motion, and the court

Art. I. When and How Action Maintained.

has power to compel defendant to furnish plaintiff with means to meet it in the usual way, but that no such effect could be given to the pleadings upon a motion like this in such an action. *Gray v. Gray*, 143 N. Y. 354.

The jurisdiction of the courts in actions for divorce is confined to the authority conferred by statute, and the grounds on which a decree may be made are matters of positive legislation. *Chamberlain v. Chamberlain*, 63 Hun, 96, 43 St. Rep. 502, 17 Supp. 578; *Dickinson v. Dickinson*, 63 Hun, 516, 45 St. Rep. 323, 18 Supp. 485, *Erkenbrack v. Erkenbrack*, 96 N. Y. 456.

Where the plaintiff is a resident of this State, was a resident when the offence charged was committed and when the action was commenced, and the marriage was solemnized here, the courts of the State have jurisdiction of an action for divorce where the defendant is a non-resident and service was made upon him by publication. *Scragg v. Scragg*, 44 St. Rep. 845, 18 Supp. 487, distinguishing *People v. Baker*, 76 N. Y. 78; *O'Dea v. O'Dea*, 101 N. Y. 23; *Jones v. Jones*, 108 N. Y. 415; *Cross v. Cross*, 101 N. Y. 628.

The term "residence" in the provisions of the Code relating to matrimonial actions is synonymous with inhabitancy or domicile, refers to the permanent abode of the parties, not to their temporary place of residence. *De Meli v. De Meli*, 120 N. Y. 485, 31 St. Rep. 704.

The right to a divorce is regulated by the Code of Procedure, and when there is sought a divorce on the grounds of adultery under § 1756, and the parties are not both residents of the State when the offence is committed, and were not married in the State, and the offence was not committed in this jurisdiction, while the injured party was a resident therein, the plaintiff must have been a resident of the State when the offence was committed and also when the action was brought, and it is necessary for the plaintiff to allege and prove these facts, as they are matters of jurisdiction. *Dickinson v. Dickinson*, 45 St. Rep. 323, 63 Hun, 516, 18 Supp. 485.

A judgment of divorce obtained in a State of which neither party is a resident and without personal service of process or an appearance, is void. *Bell v. Bell*, 4 App. Div. 527.

When in an action for divorce on the ground of adultery the defendant alleges, by way of counterclaim, adultery on the part of

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the plaintiff and proves it, it is error for the referee to say nothing in his report as to the testimony on that question and direct judgment for the plaintiff upon findings establishing guilt of the defendant. Such a judgment is in violation of paragraph 4 of § 1758, which provides that a plaintiff is not entitled to a divorce, although adultery is established, "where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce." *Griffin v. Griffin*, 70 Hun, 73, 53 St. Rep. 437, citing *Paul v. Paul*, 11 St. Rep. 71.

While the law very justly condemns any act on the part of a husband by which he voluntarily leads his wife into temptation, or in any way connives at or procures her defilement, it does not prevent him from scrutinizing her conduct, or detecting her in her voluntary violation of the sanctity of the marriage relation. Where the suspicions of a husband have been aroused, and he seeks to detect his wife's infidelity if it exists, and takes no steps to prevent her carrying out her manifest purpose of meeting the man whom he suspects as being, and who proves to be, her paramour, leaving her to her own volition, his acts in so doing do not amount to the procurement of or connivance at his wife's adultery under § 1758 of the Code of Civil Procedure. *Pettee v. Pettee*, 77 Hun, 595.

The grounds set forth in § 1758 are matters of affirmative evidence in the case that is litigated, and it is only in case of default that plaintiff cannot obtain judgment without negating these defences; so held upon comparison of §§ 1757 and 1758 with Rules 73. *McCarthy v. McCarthy*, 143 N. Y. 235.

A single act of adultery is such a violation of the marital obligation as to warrant a decree of divorce. *Doe v. Doe*, 52 Hun, 405.

ARTICLE II.

COMPLAINT. RULE 72, IN PART. RULE 75.

Rule 72 (in part.) Complaint in divorce; averments in.

When the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and also where at the time of the offence charged the defendant was living in adulterous intercourse with the person with whom the

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offence is alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff, and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the Code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

Rule 75. Questioning legitimacy of children.

On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If upon default proofs shall be taken upon the question of legitimacy as well as upon the other matters stated in the complaint, and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

It is provided by Rule 72 that judgment shall not be granted for a divorce unless it appears five years have not elapsed since the discovery of the fact that the adultery charged in the complaint had been committed, and where, at the time of the offence charged, the defendant was living in adultery with the person with whom the offence was alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by plaintiff; *held*, that the latter clause had reference to cases where the parties were living together in adulterous intercourse. *Church v. Church*, 7 St. Rep. 177. Where the complaint is verified and contains the averments required by Rule 73 (now 72) it is *prima facie* evidence of the fact, and the burden of proof is thereby thrown on defendant, who is bound to controvert and disprove such allegations as a matter of affirmative defence. *Farace v. Farace*, 61 How. 64. This is based on § 831, as it then stood, prohibiting husband or wife to testify. *Query*, whether the rule holds good as the section stands as amended in 1877, which see. In averring the offence in action for divorce on the ground of adultery, precision as to time, place and circumstance is required. *Anonymous*, 17 Abb. 48. If the name of the person with whom the offence was committed be unknown, the complaint should state particularly the place where the offence occurred, as at a house specified, and the like. *Heyde v. Heyde*, 4 Sandf. 692. An allegation that the offence was committed in February and March, 1867, in the cities of New York and Brooklyn, *held* to be sufficiently specific. *Clark v. Clark*, 7 Robt. 276. In actions of divorce, allegations of adultery committed with persons unknown to the party pleading, must never-

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theless state specifically time and places. *Tim v. Tim*, 16 Abb. (N. S.) 39.

Where the complaint alleged that the defendant, from the 1st of November previous up to the time of the verification of the complaint, went to, visited, and at various houses and places of prostitution or assignation in the city of New York, which time and places plaintiff was unable to particularize, committed adultery and had carnal connection with a person named therein; *held*, that the allegation should be rendered more definite and certain as to the place at which the adultery was committed. *Cardwell v. Cardwell*, 12 Hun, 92. A complaint is sufficient which avers the adultery with a person, whose name is unknown, between certain specified dates, and in a town or city named, and further avers that plaintiff is unable to more particularly specify the times and places. *Mitchell v. Mitchell*, 61 N. Y. 398. Where the allegation was "that said plaintiff is informed and believes that at divers times, between the 1st of July, 1879, and the commencement of this action, at various places in said village of Saratoga Springs, N. Y., but at which particular time and places plaintiff is unable to state, defendant has committed adultery with a female and with women whose names and name are unknown to plaintiff, it was held not sufficiently definite and certain; a motion for a bill of particulars should be made before answer. *Gridley v. Gridley*, 7 Civ. Pro. R. 215. The complaint should state that the discovery by the plaintiff of the defendant's criminality took place within a certain time before the commencement of the action, because, as it affects the propriety of decreeing a divorce, such time has been fixed by law and is required by rule. *Zorkowski v. Zorkowski*, 27 How. 37. It must be averred in the complaint that the adultery was committed without the consent, connivance, privity or procurement of plaintiff, and must be verified by plaintiff. *Meyers v. Meyers*, 41 Barb. 114.

A finding that, during six years before the commencement of the action, the defendant was living in open adultery, bars the plaintiff's right to a judgment under the rule. *Church v. Church*, 7 St. Rep. 177. Allegations in a complaint by a wife, respecting the amount and value of the defendant's property, with a view to alimony, are unnecessary. The matter of alimony is a question for the court after judgment. *Forrest v. Forrest*, 6 Duer, 102. If the prayer for relief is only for separation, no absolute divorce

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can be granted, if defendant do not answer, as the plaintiff can then have no further relief than that demanded in the complaint. *Walton v. Walton*, 32 Barb. 203. The prayer for relief should be that the marriage contract be declared void and dissolved, and a divorce *a vinculo* be granted. *Forrest v. Forrest*, 6 Duer, 102. Charges of adultery on the part of the defendant have no place in a complaint which prays for a separation, and will be stricken out on motion. *Allen v. Allen*, 19 Week. Dig. 219. A cause of action for dissolution of marriage and one for separation and maintenance cannot be joined. Section 484 does not allow it, and they may require different methods of trial. *Bucholz v. Bucholz*, 1 How. (N. S.) 46.

Complaint for Adultery.

SUPREME COURT.

SAMUEL VAN STEENBURGH

agst.

MARY A. VAN STEENBURGH.

The complaint of the plaintiff respectfully shows to the court that, on the 14th day of November, 1870, the plaintiff was married to the defendant, at the town of Hurley, in the county of Ulster, State of New York; that the plaintiff and defendant then were, and both of them have been up to this time, residents of this State, and were such at the time of the commission of the several acts of adultery hereinafter mentioned; that at divers places within the town of Catskill, in the county of Greene, State of New York, and at various times between the 1st day of June, 1883, and this time, at what particular times and places the plaintiff is unable to state, the defendant has committed adultery with one Jacob Layman (state times and places specifically if possible); that such adultery was committed without the consent, connivance, privity or consent, or procurement of plaintiff; that five years have not elapsed since the plaintiff discovered the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with defendant since the commission of the last offence above alleged, or at any time since June, 1883; that the issue of said marriage of the plaintiff and defendant is one child named William, born November, 1870; wherefore plaintiff demands that the bonds of matrimony between himself and the defendant be dissolved.

W. S. FREDENBURGH,
Plaintiff's Attorney.

Art. 3. The Issues and Trial.

ARTICLE III.

THE ISSUES AND TRIAL. § 1757. RULE 74, RULES 72 AND 31 IN PART.

SUB. 1. DEFAULT. RULE 72 IN PART.

2. ANSWER AND FRAMING ISSUES. § 1757. RULE 74. RULE 31 IN PART.
3. EVIDENCE.
4. PRACTICE GENERALLY.
5. TRIAL.
6. COSTS AND APPEAL.

SUB. 1. DEFAULT. RULE 72 IN PART.

Rule 72 (in part.) Failure of defendant to answer.

In an action for divorce or for the annulment of a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll. The court may, however, in case the evidence is such that the public interest require that the examination of the witnesses should not be public, exclude all persons from the court room except the parties to the action and their counsel and the witnesses, and shall order such evidence, when filed with the clerk, sealed up and exhibited only to the parties to the action or some one specially interested, upon order of the court.

SUB. 2. ANSWER AND FRAMING ISSUES. § 1757. RULES 74, 31 IN PART.

§ 1757. Answer ; mode of trial ; judgment by default.

The answer of the defendant may be made, without verifying it, notwithstanding the verification of the complaint. If the answer puts in issue the allegation of adultery, the court must, upon the application of either party, or it may, of its own motion, make an order directing the trial, by a jury, of that issue; for which purpose, the questions to be tried must be prepared and settled, as prescribed in section 970 of this act. If the answer does not put in issue the allegation of adultery, or if the defendant makes default in appearing or pleading, the plaintiff, before he is entitled to judgment, must nevertheless satisfactorily prove the material allegations of his complaint, and also, by his own testimony or otherwise, that there is no judgment or decree in any court of the State of competent jurisdiction, against him in favor of the defendant for a divorce upon the ground of adultery.

Rule 74. Answer in action for divorce ; trial.

The defendant, in the answer, may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.

Adultery committed by the plaintiff is, when set up in the answer, a perfect defence to an action for an absolute divorce, and

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is also a ground for affirmative relief in the same action. *Anonyms*, 17 Abb. 48. The adultery should be set up in the answer in the same manner, and be accompanied by the same allegations, as are required when it is charged in the complaint. *Morrell v. Morrell*, 3 Barb. 236. A condoned act of adultery is no bar to a divorce. *Morrell v. Morrell*, 1 Barb. 318. In an action for a divorce on the ground of adultery, an answer setting up the counter charges of adultery against the plaintiff, and asking a divorce in favor of the defendant, is to be regarded as setting up a counterclaim, and in order to raise an issue upon such charges in the answer a reply must be interposed. *Leslie v. Leslie*, 2 Abb. 311. See 40 Barb. 9. A divorce will not be granted where both parties are equally guilty; recriminating charges will be sustained on less evidence than would be required to sustain an action of adultery. *Peck v. Peck*, 44 Hun, 290. In an action by a husband against his wife for an absolute divorce, defendant cannot interpose the defence of cruel and inhuman treatment and abandonment, either as a bar or counterclaim. *Griffin v. Griffin*, 23 How. 183; *Diddell v. Diddell*, 3 Abb. 167. Held otherwise, under present Code, in *Spafer v. Spafer*, 12 Abb. N. C. 169.

An answer may set up not only the adultery of plaintiff, but condonation of defendant's adultery. *Wood v. Wood*, 2 Paige, 108; *Smith v. Smith*, 4 Paige, 432. A denial in the answer of an allegation in the complaint that the plaintiff was, at the time of the commencement of the action, an actual resident of this State, does not take from the court the power to award temporary alimony and expenses. *Brinkley v. Brinkley*, 50 N. Y. 184. The averments in a verified complaint that the alleged adultery was committed without the plaintiff's connivance, that five years have not elapsed since the discovery, and that there has been no subsequent cohabitation, casts upon the defendant the burden of disproving the same; they are deemed matters of affirmative defence. *Farace v. Farace*, 61 How. 61. Where the defendant sets out a record showing insanity at a time previous to the adultery as a defence, the burden of proving that defendant was not insane at the time of the commission of the offence is put upon plaintiff. *Cook v. Cook*, 53 Barb. 180. The provision that defendant need not verify the answer is taken from the Revised Statutes, and in accordance with holding in *Sweet v. Sweet*, 15 How. 169; *Anable v. Anable*, 24 How. 92. Condonation by subsequent cohabitation

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does not bar a subsequent action for divorce, predicated on such adultery, where the consideration is upon the promise by the guilty party that he would in all things, thereafter, treat his wife kindly and in proper manner, and would in all things be a good and affectionate husband, and he has violated his promise. *Timerson v. Timerson*, 2 How. (N. S.) 26.

If the defendant wishes to prove a condonation of the offence, or to establish a recriminating charge in bar of divorce, she should set it up as defence. *Smith v. Smith*, 4 Paige, 432; *Hopper v. Hopper*, 11 Paige, 46; *Roe v. Roe*, 14 Hun, 612. The answer need not allege any facts which are necessary to give jurisdiction in an action for divorce, the defence of adultery itself being sufficient without such proof. *Lescur v. Lescur*, 31 Barb. 330. It was held in *Brown v. Brown*, 3 T. & C. 477, that where, in an action for divorce, service was by publication, and defendant moved to be let in on showing that he had received no notice, and had a defence under § 135 of the old Code, that the court had no power to permit a defence. The same provision is embodied in § 447 of the present Code, but this case was reversed, 58 N. Y. 609, which see. The court may allow a supplemental answer to be filed alleging adultery on the part of the plaintiff, committed or discovered after the joining of issue. *Strong v. Strong*, 3 Robt. 669; *Smith v. Smith*, 4 Paige, 432. A husband may have a divorce for his wife's adultery, though he also has been guilty of a like offence with her connivance. *Bleck v. Bleck*, 27 Hun, 296. Cruelty of the husband will not prevent him from obtaining a divorce on the ground of his wife's adultery. *Uhlman v. Uhlman*, 17 Abb. N. C. 236.

Voluntary cohabitation by a wife with knowledge of husband's adultery is a bar; *Williamson v. Williamson*, 1 Johns. Ch. 488; *Johnson v. Johnson*, 14 Wend. 637; although it is said in *Wood v. Wood*, 2 Paige, 108, and *Hoffmire v. Hoffmire*, 7 Paige, 60, that cohabitation by the wife is not always a bar, as she is to some extent under the control of the husband. Cohabitation after knowledge by the husband of the commission of adultery by the wife, is an absolute bar to divorce. *Pitts v. Pitts*, 52 N. Y. 593. But upon conditional forgiveness, the injury is revived upon the repetition of the offence. *Smith v. Smith*, 4 Paige, 432; *Johnson v. Johnson*, 14 Wend. 637; *Burr v. Burr*, 10 Paige, 20, affirmed, 7 Hill, 207; *Davies v. Davies*, 55 Barb. 130. See those cases as

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to whether cruelty will revive a condoned adultery, while *Hoffmire v. Hoffmire*, 7 Paige, 60, is authority that conviction for felony is cruelty which revives conditional adultery. A plaintiff in divorce who, in good faith, marries after judgment in his favor, which is subsequently reversed on appeal, is not guilty of adultery for so doing; but the defendant is estopped in a second action of divorce from asserting that the plaintiff committed adultery with the woman he married in reliance upon the judgment. *Bailey v. Bailey*, 45 Hun, 278. Divorce cannot be granted for acts occurring before marriage; *Anonymous v. Anonymous*, 2 Law Bull. 13; nor for adultery committed after suit brought. *Ferrier v. Ferrier*, 4 Edw. 296. If after suit brought the husband is guilty of adultery, it is a bar to his divorce. *Smith v. Smith*, 4 Paige, 432. If both parties to the suit have been guilty of adultery, neither is entitled to a divorce. *Peck v. Peck*, 44 Hun, 290; *Wood v. Wood*, 2 Paige, 108. After a decree of limited divorce has been obtained in another State, and while it remains unimpeached, plaintiff cannot sue here for absolute divorce. *Coddington v. Coddington*, 10 Abb. 450. Insanity, at time of suit brought, will not bar an action of divorce, where it appears that the defendant committed the act of adultery while he was of sound mind, although he subsequently became insane, and was, for several years previous to and at the time of the commencement of the action, a lunatic. *Rathbun v. Rathbun*, 40 How. 328. A deed of separation is no bar to a divorce for a cause accruing either previous or subsequent. *Anderson v. Anderson*, 1 Edw. 380. As to answer setting up counterclaim, see § 1770 and cases cited.

Where, in an action brought by a wife to procure an absolute divorce from her husband on account of his adultery, the complaint alleges the adultery was committed with a woman named therein, such woman cannot, upon the failure of defendant to appear and answer, be made a party to the action and be allowed to answer and defend on the merits. The court will, however, require notice to be given to her counsel of all proceedings to take testimony in the action, and will allow her to be present and to cross-examine the witnesses produced, to be herself sworn as a witness and give her testimony, and to have summoned and examined such witnesses as she may desire. *Clay v. Clay*, 21 Hun, 609, cited and limited in *Quigley v. Quigley*, 45 Hun, 23.

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Part of Rule 31. Settling of issues — motion for jury trial.

In cases where the trial of issues of fact is not provided for by the Code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by a jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and in proper form to be incorporated in the order; and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in sections 823 and 970 of the Code of Civil Procedure.

§ 969. What issues are triable by the court.

An issue of law, in any action, and an issue of fact in an action not specified in the last section, or wherein provision for a trial by a jury is not expressly made by law, must be tried by the court, unless a reference or a jury trial is directed.

§ 970. [Am'd, 1892.] Order for trial by jury of specific questions of fact, when of right.

Where a party is entitled by the constitution, or by express provision of law, to a trial by a jury, of one or more issues of fact, in an action not specified in section nine hundred and sixty-eight of this act, he may apply, upon notice, to the court for an order, directing all the questions arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which by a jury the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same, as where questions arising upon the issues are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury upon such questions so stated, is conclusive in the action unless the verdict is set aside, or a new trial is granted.

Where an action for divorce for adultery is reached on Special Term calendar, and on defendant's application issues are ordered framed, the court may order the trial thereon to proceed on any day it chooses, before a jury. *Compton v. Compton*, 46 Super. Ct. 579. The right to have issues of fact tried by a jury is a constitutional one and cannot be limited by the rules. *Conderman v. Conderman*, 44 Hun. 181. Under the old Code an action of divorce must be tried by a jury, unless a jury trial was waived. § 253. *Dictz v. Dictz*, 48 How. 114. The only provision on the subject is now contained in § 1757. Each party to an action of divorce has both a constitutional and statutory right to trial by jury. Reference or trial by the court cannot be compelled; the right to trial by jury may be waived as provided by § 1009. *Batzel v. Batzel*, 42 Super. Ct. 561; *Morrell v. Morrell*, 17 Hun. 324; *Anonymous*, 3 Abb. N. C. 161. This right cannot be affected by

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the rules of practice, and Rule 31 is applicable to a different class of cases. *Conderman v. Conderman*, 44 Hun, 181. It is not a matter of right where allegations of complaint are not denied by the answer. *Galusha v. Galusha*, 43 Hun, 181.

Issues as to adultery must be settled before notice of trial can be given or the cause placed on the calendar. *Leslie v. Leslie*, 11 Ab. (N. S.) 311. In suits for divorce, issues are only to be made up for the trial of the facts contested by the pleadings. The allegations expressly made on the one side and denied on the other, and those only, are to be tried. *Morrell v. Morrell*, 3 Barb. 236. The issues will not be referred where objection is made by one of the parties, if there is power to do so, which is doubtful. *Baker v. Baker*, 3 Law Bull. 93.

It is improper to impose as a condition of granting temporary alimony in an action for divorce on the ground of adultery, that the wife waive a jury trial and consent to a trial of the action before the court or referee. The right to trial by jury on the question of adultery, when put in issue, has existed ever since the power was given to the courts of this State to grant divorces. This power was transferred to the Court of Chancery by the Laws of 1787 and continued in the revision of the statutes. It existed at the time of the adoption of the Constitution of 1846, and is therefore continued by the provision, "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." *Lowenthal v. Lowenthal*, 68 Hun, 366, 51 St. Rep. 882, disapproving *Siegel v. Siegel*, 19 Supp. 906.

In framing issues for trial, great care should be had to add such certainty to the charges of misconduct on the part of the defendant as will afford a complete opportunity to meet them on the trial. *DeCarillo v. DeCarillo*, 53 Hun, 359, S. C. 17 Civ. Pro. R. 220, 25 St. Rep. 423.

Where an issue as to adultery is taken in an action for divorce, the defendant has a right to a trial thereof by jury, and the finding thereon is conclusive. *Lowenthal v. Lowenthal*, 92 Hun, 385, 36 N. Y. Supp. 1053, 72 St. Rep. 276.

SUB. 3. EVIDENCE.

Proof of actual marriage is not necessary, but the marriage may be shown from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances. Matri-

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monial cohabitation, acts of recognition of the parties as husband and wife by friends, together with general reputation, will be sufficient to establish the fact of marriage. *Fenton v. Reed*, 4 Johns. 52; *Jackson v. Claw*, 18 Johns. 346; *Hicks v. Cochran*, 4 Edw. 107; *Clayton v. Wardell*, 5 Barb. 214; *Matter of Taylor*, 9 Paige, 611. It is entirely competent to prove marriage by cohabitation, acknowledgment of the marriage by the parties themselves, reception of them as married by their relatives and friends, and common reputation. *O'Gara v. Eisenlohr*, 38 N. Y. 296. Cited with approval, *Brinkley v. Brinkley*, 50 N. Y. 184, followed in *Alexander v. Chamberlain*, 1 T. & C. 601. As to what constitutes marriage in this State, see *Fenton v. Reed*, 4 Johns. 52; *Starr v. Peck*, 1 Hill, 270, and case in which they are cited and discussed; Abbott's N. Y. Digest Cases Criticised. See also, *Rockwell v. Tunnickliff*, 62 Barb. 408; *Clayton v. Wardell*, 4 N. Y. 230. In *Collins v. Collins*, 80 N. Y. 1, *held*, that where, at the time of the alleged marriage, a party believed himself competent to marry, but was, in fact, under a disability, rendering the marriage void, which disability subsequently ceased, proof of cohabitation thereafter, without any new marriage contract, is not satisfactory proof of a valid marriage. Where a connection was meretricious in its origin, and it is doubtful whether the woman ever regarded herself as the wife, although the husband assumed the character of husband and the woman that of wife, to the public, the conclusion of the trial judge had evidence to support it and the Court of Appeals refused to interpose. *Harbeck v. Harbeck*, 102 N. Y. 714. Where the adultery is charged to have been with a certain person, the evidence must be confined to the offence charged. *Germond v. Germond*, 6 Johns. Ch. 347; *Bokel v. Bokel*, 3 Edw. 376; *Kane v. Kane*, 3 Edw. 389; *Klein v. Wolfsohn*, 1 Abb. N. C. 134. The evidence of adultery must be full and explicit, and it must be shown that there is no collusion. *Hanks v. Hanks*, 3 Edw. 469; *Turney v. Turney*, 4 Edw. 566. Unless the fact of adultery be clearly proved, the presumption of innocence must prevail. *Donnelly v. Donnelly*, 63 How. 481. That there was opportunity for illicit intercourse is not enough; there must be some accompanying circumstances which fairly induce the belief that the residence of the parties under the same roof was not for a proper purpose. *Hart v. Hart*, 2 Edw. 437; *Pollock v. Pollock*, 71 N. Y. 137. See *Platt v. Platt*, 5 Daly, 295.

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Although the evidence discloses association, frequent interviews and intimacy between a defendant and the woman with whom he is charged with having adulterous intercourse, if there was no creditable evidence of improper conduct or familiarities, or of any criminal attachment between them, and the evidence showed the frequent meetings of the parties were for proper and innocent purposes, a charge of adultery cannot be sustained. *Conger v. Conger*, 82 N. Y. 603. In weighing the evidence and considering the facts and circumstances, great care is necessary, on the one hand, not to be misled, by circumstances reasonably capable of two interpretations, into giving them an evil rather than an innocent one, nor on the other by refusing to give them their plain and natural significance, on the theory that a different standard of judgment applies to such cases from that which ordinarily guides the conclusions of intelligent and conscientious men. The circumstance must be considered separately and, also, as a whole. The single threads of circumstances may be weak, but united, they often lead, with assured conviction, to the final fact which is the subject of investigation. *Allen v. Allen*, 101 N. Y. 658. Circumstantial evidence of adultery may be rebutted by evidence that the woman was in such ill-health as to negative the idea of criminal disposition. *Anonymous*, 3 Abb. N. C. 161. It is not sufficient evidence of identity that the person served was pointed out as the defendant by plaintiff. *Louns v. Louns*, 1 Law Bull. 34.

Where the testimony as to the alleged adultery rests principally on the admissions of the defendant, it is not sufficient. *Allder v. Allder*, 1 Law Bull. 58. Divorce will not be granted on evidence that the husband was in the habit of visiting a house of prostitution, and even went with one of the inmates to her room, it not appearing that he was ever alone in a room with any of the inmates, or with the door shut. *Platt v. Platt*, 9 Daly, 295. In an action for divorce on the ground of adultery, defendant denied the charges and alleged adultery on the part of the plaintiff; the issues having been referred and a report having been made in favor of plaintiff and against the defendant, the report was confirmed and judgment for plaintiff ordered at Special Term. An appeal having been taken on the ground that the evidence was insufficient to warrant the judgment, *held*, that the evidence being conflicting, and a just conclusion depending upon the veracity of the witnesses who appeared before the referee, there was no reason

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to reverse his findings. *Holcomb v. Holcomb*, 3 St. Rep. 762. One marrying in good faith after having recovered a judgment for divorce, and before its reversal on appeal, is not guilty of adultery. *Baily v. Baily*, 45 Hun. 378. In a suit for divorce for adultery, evidence of cruelty, immediately connected with the adultery charged, may be admitted to show an alienation of the affections and as affording an inference of the adultery, but not as a foundation for a decree of separation. *Mulloch v. Mulloch*, 1 Edw. Ch. 14. The complainant who seeks a decree, declaring the children of his wife illegitimate, must produce some other evidence of his non-access than the mere fact that his wife was living in open adultery with another person. *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375. Non-cohabitation cannot be proved by a witness deposing that the parties had not resided together since their separation, to the best of his knowledge and belief; but the person with whom the wife had resided since that time should be called to prove that fact. *Turney v. Turney*, 4 Edw. Ch. 566. A divorce will not be decreed upon evidence which leaves the fact of the defendant's guilt in doubt. *Ferguson v. Ferguson*, 1 Barb. Ch. 604. While to authorize a divorce for adultery direct proof of the crime is not required, yet there should be a fair inference to a necessary conclusion—a conclusion so far inevitable that the supposition of innocence cannot by any just course of reasoning be reconciled with it. *Anonymous*, 17 Abb. 48. This inference cannot be drawn from appearances that are equally capable of two interpretations. *Ferguson v. Ferguson*, 3 Sandf. 307. A husband who has abandoned his family for years must present very clear proofs of adultery against his wife, to entitle him to a divorce. *Trust v. Trust*, 11 How. 523. A divorce ought not to be granted on the unsupported evidence of the husband's paramour. *Anonymous*, 5 Robt. 611; *Turney v. Turney*, 4 Edw. 566; *Banta v. Banta*, 3 Edw. 295; *Anonymous*, 17 Abb. 48.

But the fact may be proved by circumstantial evidence from facts which lead to it as a necessary conclusion. *Mulloch v. Mulloch*, 1 Edw. 14; *Anonymous*, 17 Abb. 48; *Ferguson v. Ferguson*, 3 Sandf. 307. Proof of illicit intercourse with a notorious prostitute before marriage, and a continuance of the intimacy afterward, together with evidence of defendant's dissolute character and habits, held, sufficient. *Van Epps v. Van Epps*, 6 Barb. 320; *Smith v.*

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Smith, 4 Paige, 432. Where there is evidence tending to show repeated acts of familiarity, it is competent to introduce evidence of intercourse with the same person which took place prior to the marriage, in order to characterize the subsequent conduct of the parties. It is evidence which, if believed, authorizes the finding of adulterous intercourse on the occasion to which it referred, and in view of the evidence of subsequent opportunity and inclination, justifies the inference that the unlawful connection was continued. *Paul v. Paul*, 11 St. Rep. 71. That the husband had syphilis long after marriage, *held*, sufficient proof in *Johnson v. Johnson*, 1 Edw. 439; S. C. 4 Paige, 460, 14 Wend. 637. *Contra*, *Ferguson v. Ferguson*, 1 Barb. Ch. 604; S. C. 3 Sandf. 407. But it is not sufficient proof of the husband's adultery that the wife has the venereal disease. *Homburger v. Homburger*, 46 How. 346. Proof of two or three visits to a brothel by a husband, unaccompanied by a woman, is not sufficient evidence of adultery to authorize a divorce. *Zorkowski v. Zorkowski*, 27 How. 37. A divorce for adultery will not be decreed on the confession of the defendant, unless sustained and corroborated by other proof. *Betts v. Betts*, 1 Johns. Ch. 197; *Van Veghten v. Van Veghten*, 4 Johns. Ch. 501; *Lyon v. Lyon*, 62 Barb. 138. But in an action for divorce, brought by the husband, the written confession of the acts of adultery by the wife were clear and distinct, and there was undoubted proof that they were sincere and not collusive, and they were corroborated by the correspondence of the wife and by letters of the guilty parties. *Held*, that the confessions were sufficiently corroborated by the letters, and that a judgment of divorce should be granted. *Madge v. Madge*, 4 St. Rep. 609. A divorce will not be granted on the uncorroborated evidence of a prostitute paid for testifying, and of the detective who employed her. *Bentley v. Bentley*, 3 Law Bull. 76. Divorces should not be granted on the evidence of prostitutes and private detectives, and their testimony should always be scrutinized with vigilance and distrust. *Moller v. Moller*, 9 St. Rep. 800. The rule of evidence in an action for divorce *a vinculo*, is the same as in other civil actions; a mere preponderance of proof is sufficient. The rule requiring proof beyond a reasonable doubt, as in criminal cases, does not apply; the same standard of judgment applies as in ordinary cases. *Allen v. Allen*, 101 N. Y. 658.

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§ 831. [Am'd, 1879, 1880, 1887.] When husband and wife not competent witnesses — when competent.

A husband or a wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage, or disprove the allegation of adultery. A husband or wife shall not be compelled, or without consent of the other, if living, allowed to disclose a confidential communication, made by one to the other, during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff.

The parties formerly were only competent to prove the fact of the marriage. *Roe v. Roe*, 40 Super. Ct. 1; *Southwick v. Southwick*, 49 N. Y. 510. In an action by a husband against the wife for a divorce on the ground of adultery the wife was not a competent witness on her behalf before the amendment of 1887. *Rivenburgh v. Rivenburgh*, 47 Barb. 419; *Hennessey v. Hennessey*, 58 How. 304. See *Jacobson v. Jacobson*, 8 St. Rep. 383, as to what is a violation of that section. But § 831 was amended to permit the husband or wife to testify against the other upon the trial of an action founded upon an allegation of adultery, not only to prove the marriage, but also to disprove the alleged adultery. *DeMeli v. DeMeli*, 11 St. Rep. 291. The husband may testify in the wife's favor under § 831, but not against her; *Bailey v. Bailey*, 41 Hun, 424; nor can the defendant be examined as a witness for the plaintiff. *Arborgast v. Arborgast*, 8 How. 297; *Sweet v. Sweet*, 15 How. 169; *Anable v. Anable*, 24 How. 92.

A husband, who admits the alleged marriage with the complainant, is not a competent witness to prove the invalidity of the marriage by reason of a prior marriage on his part. *Finn v. Finn*, 12 Hun, 339. In an action for divorce, a physician testified to certain circumstances and conversations tending to establish the fact of adultery, and stated that he derived his information from the defendant as a patient in professional confidence. *Held*, inadmissible. *Hunn v. Hunn*, 1 T. & C. 499; *Johnson v. Johnson*, 4 Paige, 468.

In an action for absolute divorce contested in good faith, the co-respondent will not be permitted to intervene and cross-examine plaintiff's witnesses. *Burke v. Burke*, 5 Misc. 319, citing *Quigley v. Quigley*, 45 Hun, 23, and distinguishing *Clay v. Clay*, 21 Hun, 609.

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Evidence to prove adultery where only a single act was charged and but one witness, the mother of the plaintiff, manifestly prejudiced, testified to it, held insufficient. *Fanning v. Fanning*, 2 Misc. 90, 49 St. Rep. 234, 20 Supp. 849, citing *Lyon v. Lyon*, 62 Barb. 138; *Moller v. Moller*, 115 N. Y. 466; *Pollock v. Pollock*, 71 N. Y. 137.

Where in an action for divorce the defence was that there had been a marriage only in form and that plaintiff had a former husband living at the time, plaintiff gave no evidence on the reference, the complaint was dismissed and judgment rendered for defendant on evidence procured by him, that the marriage was void, *held* regular under § 1743 of the Code. *Jones v. Jones*, 71 Hun, 519, 54 St. Rep. 885, 24 Supp. 1031, citing *Finn v. Finn*, 62 How. Pr. 83; *Hunt v. Hunt*, 72 N. Y. 217; *Prior v. Prior*, 15 Civ. Pro. R. 436; *Cromwell v. Hull*, 97 N. Y. 209; *Reed v. Reed*, 107 N. Y. 545; *Rima v. Rossie Iron Works*, 120 N. Y. 438; *Blanc v. Blanc*, 51 St. Rep. 822.

Failure to produce as a witness the person with whom adultery is charged, though defendant is able to do so, is a circumstance which creates a strong presumption against defendant though not conclusive. *Kenyon v. Kenyon*, 88 Hun, 211, 68 St. Rep. 701, 34 Supp. 720, citing *Rider v. Miller*, 86 N. Y. 507; *Gordon v. People*, 33 N. Y. 501; *Schwier v. New York Central, etc., R. R. Co.* 90 N. Y. 558; *Bleecker v. Johnson*, 69 N. Y. 309; *Crary v. Crary*, 18 Supp. 753; *People v. Hovey*, 92 N. Y. 554; *Byrne v. Brooklyn City & Newton R. R. Co.*, 58 St. Rep. 121.

Charges of adultery must be established by clear and convincing evidence. *Smith v. Smith*, 89 Hun, 610, 35 Supp. 556.

Where the complaint alleged several specific acts of adultery, only two of which were denied in the answer, and a demand for a jury trial was denied, it was held that as the acts proved were those not denied by the answer, it was proper to proceed with the hearing as to those acts. *Galusha v. Galusha*, 43 Hun, 181, 4 St. Rep. 399. This decision was modified on another point, 116 N. Y. 635, holding that an agreement for separation is valid so far as it provides for the support of the wife even though subsequently a divorce is had.

Where there is a conflict of evidence as to the adultery the question is for the jury, and if the evidence is sufficient to support the verdict it will be sustained. *Whitney v. Whitney*, 76

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Hun, 585; s. c. 58 St. Rep. 272, 28 Supp. 214, citing *Ferguson v. Ferguson*, 3 Sandf. 307; *Pollock v. Pollock*, 71 N. Y. 137.

Circumstantial evidence, to support a decree for an absolute divorce, reviewed and held sufficient. *Warren v. Warren*, 8 Misc. 189; s. c. 59 St. Rep. 390, 29 Supp. 313, citing *Moller v. Moller*, 115 N. Y. 466, and distinguishing *Pollock v. Pollock*, 71 N. Y. 137.

The mere fact that a husband takes no steps to prevent a meeting between his wife and one whom he supposes to be her paramour, but, allows her to go with the intention of detecting her infidelity, does not amount to connivance under § 1758 of the Code. *Pettee v. Pettee*, 77 Hun, 595, 28 Supp. 1067, 60 St. Rep. 529. Decree awarded against testimony of defendant and co-respondent in action for absolute divorce. *Uhland v. Uhland*, 59 St. Rep. 655, 27 Supp. 647. Evidence held sufficient to justify a decree on the ground of adultery. *Schreiber v. Schreiber*, 3 Misc. 411, 52 St. Rep. 436, 23 Supp. 299, citing *Moller v. Moller*, 115 N. Y. 466; *Auld v. Auld*, 40 St. Rep. 904.

Where evidence of defendant's previous conduct was admitted in an action for divorce, she denied the adultery charged, and plaintiff's witnesses were contradicted in many particulars, *held*, that judgment for plaintiff should be reversed. *Davis v. Davis*, 4 Misc. 454, 24 Supp. 1151, citing *Beadleston v. Beadleston*, 20 St. Rep. 29, and distinguishing *Forrest v. Forrest*, 25 N. Y. 501.

An absolute divorce may be granted in a litigated action upon the uncorroborated testimony of the co-respondent, where there is no fraud or collusion. *Crary v. Crary*, 46 St. Rep. 307; s. c. 18 Supp. 753. A finding that adultery was not made out by the evidence of four witnesses who gained admission, upon a frivolous pretense adhered to at the trial, to defendant's apartments where he had an unmarried woman as a house-keeper, sustained, where such testimony was contradicted by the parties. *Welke v. Welke*, 44 St. Rep. 21; s. c. 17 Supp. 298, citing *Pierson v. People*, 79 N. Y. 424.

Where the husband defendant failed to appear as a witness, it was held that slight corroboration of the testimony of prostitutes against him was required, and that the circumstance surrounding his taking an abandoned woman to his house, where she remained over night, and letters written by him to the co-respondent were sufficient. *McCarthy v. McCarthy*, 143 N. Y. 235. Circumstances sufficient to warrant a finding of the commission of adultery; the

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rule that where the acts of parties are capable of two constructions that in favor of innocence is to prevail, does not apply where a combination of circumstances points to guilt with such potency as to exclude every other hypothesis. *Warren v. Warren*, 8 Misc. 189, 59 St. Rep. 390, 29 N. Y. Supp. 313.

In an action for absolute divorce, in which counter-charges of adultery are made in the answer, testimony of the plaintiff which is competent upon the issues presented by the answer is admissible, although incompetent upon the charges made by the complaint. *McCarthy v. McCarthy*, 143 N. Y. 235, 38 New Eng. Rep. 288, 62 St. Rep. 184. Where the alleged paramour is called in an action for divorce, and denies the acts of adultery charged, a question on cross-examination as to whether he did not admit to a person named, that illicit relations existed between him and the party charged with adultery is competent as laying a foundation for the collateral impeachment of his testimony. *Woodrick v. Woodrick*, 141 N. Y. 457, 36 New Eng. Rep. 395, 57 St. Rep. 643.

A co-respondent in an action for divorce must answer truthfully or decline to answer questions tending to criminate or degrade him; he is not justified in committing perjury to protect the defendant's reputation. *Uhland v. Uhland*, 27 Supp. 647, 59 St. Rep. 655. The evidence of circumstances may be sufficient to prove adultery. *Chase v. Chase*, 44 St. Rep. 766; S. C. 19 Supp. 268.

Proof of adultery was held sufficient on review of the evidence. *Auld v. Auld*, 40 St. Rep. 904; S. C. 16 Supp. 803, citing *Smith v. Smith*, 13 Supp. 817; *Homburger v. Homburger*, 46 How. Pr. 346; *Ferguson v. Ferguson*, 3 Sandf. 307. Acts of defendant, charged with adultery in an action for divorce, which may appear improper, but are capable of an innocent interpretation, must be construed to be innocent, so held reviewing the evidence taken before a referee. *Steffens v. Steffens*, 33 St. Rep. 643; S. C. 19 Civ. Pro. 267, 11 Supp. 424, citing *Pfeiffer v. Pfeiffer*, 27 St. Rep. 567.

It seems that the requirement of corroboration of a paramour's testimony, was founded mainly on the inability of a party charged with adultery to contradict such testimony in an action between them for divorce on that ground; and that hence by the amendment of Code Civ. Pro. § 831, permitting a husband or wife to

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be a witness to disprove adultery in such an action, the force of the reason requiring corroboration of a paramour's testimony has been considerably weakened, and the sufficiency of such testimony must depend mainly on the degree of the paramour's credibility. *Steffens v. Steffens*, 33 St. Rep. 643; s. c. 19 Civ. Pro. 267, 11 Supp. 424, citing *Platt v. Platt*, 5 Daly, 295; *Anonymous*, 17 Abb. Pr. 48; *Anonymous*, 5 Robt. 611.

In an action brought by a wife for a separation, where the husband sets up a counter-claim for an absolute divorce, testimony on his part which is competent on the issue of cruelty charged against him, is admissible, although it might be objectionable under Code of Civil Procedure, § 831, as bearing upon the other issue. In an action for divorce a paper containing salacious verses alleged to be in the handwriting of the party proceeded against and found in her private writing desk is admissible in evidence. *Woodrick v. Woodrick*, 141 N. Y. 457, 57 St. Rep. 634. The relations between the defendant sued for an absolute divorce, and the correspondent, not in immediate connection with the specific act of adultery found, may be proved to show inclination. *Smith v. Smith*, 37 St. Rep. 267, 13 Supp. 817.

Association with prostitutes and giving secret entertainment to women in the night time, held sufficient to justify a finding of adultery. *Emerson v. Emerson*, 42 St. Rep. 562, 16 Supp. 793.

Confessions of adultery corroborated by circumstances and the conduct of the accused, and free from collusion, and where the defendant refused to testify in his own behalf, held sufficient evidence to sustain a decree of divorce. *Sigel v. Sigel*, 47 St. Rep. 397, citing *Madge v. Madge*, 42 Hun, 524; *Smith v. Gunn*, 35 St. Rep. 427; *Gibson v. Park Bk.*, 98 N. Y. 87, and distinguishing *Lyon v. Lyon*, 62 Barb. 142.

Where the complaint is verified, the averments required by rule 73 are *prima facie* proof, and the burden of proof is shifted upon the defendant, who must controvert the same as a matter of affirmative evidence. *Farace v. Farace*, 1 Civ. Pro. 419. Where a husband is called on to answer for his conduct toward his children, he is entitled to prove all the circumstances attending such conduct and the reasons for it that he may justify it. *Rose v. Rose*, 22 St. Rep. 526. As to what conduct on part of husband renders it unsafe and improper for the wife to cohabit with him see *Uhlman v. Uhlman*, 17 Abb. N. C. 236. In *Fowler v. Fowler*, 11 Supp.

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419, a letter written by plaintiff to defendant stating defendant's cruelty and injustice, was admitted as a statement made to and not denied by him, also evidence of statements made by defendant to plaintiff to deceive her and that on the second night of their marriage, defendant said he did not love her and made a mistake in marrying her. Evidence of the improper relations and conduct of the parties between whom adultery is charged anterior and subsequent to the time charged, is competent to show an adulterous intent. *Smith v. Smith*, 13 Supp. 817.

Where the plaintiff's case was supported only by her own evidence and defendant's by that of himself and two domestic servants, held that the decision of the trial judge would not be disturbed. *Murray v. Murray*, 16 Supp. 363, citing 58 How. 278, 17 Abb. N. C. 236, 73 N. Y. 369, 120 N. Y. 485, 9 Supp. 858. In *Steffens v. Steffens*, 11 Supp. 424, the court refused to reverse the finding of a referee in favor of defendant upon very conflicting evidence. An order of publication will not be made in a divorce suit on plaintiff's affidavit alone of defendant's non-residence, without other proof. *Hall v. Hall*, 10 Supp. 223. Where it was found that parties were domiciled in this State, evidence of the record of a judgment of divorce of a court in Germany, in an action brought by defendant against the plaintiff wherein there was no personal service of process on her and no appearance by her, was properly excluded. As to when the wife can testify that she was not guilty of adultery in an action brought by the husband. *DeMeli v. DeMeli*, 120 N. Y. 485.

In *Auld v. Auld*, 40 St. Rep. 904, the following was held to be sufficient evidence to warrant a divorce: "Going to the depot to meet another man, kissing him on his arrival, accompanying him to a boarding house, occupying the same hammock with him, allowing him to hug her while in the hammock, frequenting his room and permitting him to frequent her room during the day and night, on one occasion while she had on a sleeveless vest, corsets and underskirt allowing him to accompany her to the door of the water-closet, finding her hair pins between the sheets of his bed," etc., etc. This case lays down as a rule of law that married women should not only avoid evil but the appearance of it. The co-respondent "was the first love of the wife."

The fact that plaintiff's wife visited a respectable saloon with co-respondent and drank with him there before marriage, and

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that after marriage he called on her without her husband's knowledge, is not alone sufficient evidence of guilt. Although the acts of defendant might have been suspicious and improper, they were as susceptible of an innocent as guilty construction, and when such is the case the court is bound to adopt the former. *Pfeiffer v. Pfeiffer*, 27 St. Rep. 567, 9 Supp. 28, citing *Allen v. Allen*, 101 N. Y. 658; *Pollock v. Pollock*, 71 N. Y. 137.

Allen v. Allen, 101 N. Y. 658, holds that adultery may be established by such facts as satisfy the mind of the tribunal required to pass upon the question, of the truth of the charge; the evidence need not lead the judgment, as a necessary conclusion to the determination that adultery has been actually committed. But in *Beadleston v. Beadleston*, 2 Supp. 809; s. c. 20 St. Rep. 21, it was held error to admit evidence of conduct highly improper on the part of defendant, with one with whom adultery was not charged, where such an action did not show criminal intimacy. Also *Stevens v. Stevens*, 8 Supp. 47. The confessions of the person charged with adultery are always admissible but the court will require corroboration so as to remove all suspicion of collusion; when that is satisfactorily done, the confessions become a sufficient basis for a divorce. *Madge v. Madge*, 42 Hun, 524.

The uncorroborated evidence of prostitutes and private detectives is insufficient to sustain a charge of adultery in an action for divorce. Where, however, the testimony of such witnesses is corroborated by proofs of facts and circumstances harmonizing therewith, giving such weight and strength to the testimony as to induce belief in its truth, a judgment founded thereon is proper. Although the consequences which follow a judgment of divorce are so serious and momentous that such a judgment should not be granted unless the evidence which furnishes the basis therefor, is, after very careful scrutiny, satisfactory and such as can command the confidence of a careful, prudent and cautious judge, the courts must take such evidence as the nature of the case permits, circumstantial, direct or positive, and bring to bear upon it the experiences and observations of life and thus weighing it with prudence and care, give effect to its just preponderance, so held, sustaining a judgment in favor of plaintiff upon a review of the evidence and reversing an order of General Term which reversed such judgment. *Moller v. Moller*, 115 N. Y. 466; s. c. 26 St. Rep. 207, citing *Banta v. Banta*, 3 Edw.

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Ch. 295; *Turney v. Turney*, 4 Edw. Ch. 566; *Platt v. Platt*, 5 Daly, 295; *Anonyms*, 5 Robt. 611; *Chambers v. Chambers*, 1 Hagg. Ch. 439.

The courts regard the uncorroborated evidence of prostitutes and private detectives as insufficient to break the bonds of matrimony, but in divorce cases the courts must take such evidence as the nature of the case permits, circumstantial, direct or positive, and must bring to bear upon it the tests of observation and experience in the exercise of good judgment. It is to be weighed with prudence and care, and effect must be given to its preponderance. Where the testimony of prostitutes relative to an act of adultery is corroborated both as to the person with whom the adultery was committed and as to the date of the act, the court will not interfere with the judgment. While it is a general rule that marriage operates as an oblivion of prior improper acts, the rule is not the same where the adultery, which is the basis of the action, is charged to have taken place with the same person with whom the defendant had had illicit relations before his marriage. Circumstances which may be proved to have existed subsequent to the marriage will have a very different complexion if taken standing alone, or if taken in conjunction with an antecedent criminal connection. Where the defendant procures, before the trial, affidavits from prostitutes which are at variance with their testimony upon the trial, the only effect of the affidavits is to intensify the already existing necessity that such witnesses should be corroborated. *Mott v. Mott*, 3 App. Div. 532.

Uncontradicted and unexplained evidence that defendant accompanied a woman to a house of bad character in the evening and remained there about an hour, and the fact that a cabman testified he had carried people to the house he knew did not belong there, will sustain a decree for divorce. *Van Name v. Van Name*, 49 Hun, 264. Evidence relating to visits of defendant to other houses of ill-fame than those in which the adultery was committed and his improper conduct there, is admissible to show that his habits and inclination bears on the probability of the evidence in support of the specific charges. *Carpenter v. Carpenter*, 30 St. Rep. 955, 9 Supp. 583, distinguishing *Van Epps v. Van Epps*, 6 Barb. 320. Nor is it error in such action to permit proof of the fact that since a separation the defendant has contributed nothing to the support of his wife. *Van Epps v.*

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Van Epps, 6 Barb. 320. Where a person testifies positively that a house is a house of ill-fame, he must be presumed on appeal to speak from personal observation. *Carpenter v. Carpenter*, 9 Supp. 583. A recriminating charge made in an action by the wife, may be sustained on evidence not so strong as might be necessary to sustain a suit for adultery. *Peck v. Peck*, 44 Hun. 290, 7 St. Rep. 653. If both parties to an action brought by the husband have been guilty of adultery, neither is entitled to a divorce though the wife sinned through the connivance of the husband. *Peck v. Peck*, 44 Hun. 290, 7 St. Rep. 653.

Where an issue of guilt of plaintiff is raised by the pleadings, it must be determined before it can be adjudged that plaintiff is entitled to a divorce though the adultery of defendant is established. In such case the court cannot assume that a conclusion of law found by the referee that plaintiff was entitled to judgment was a finding of this issue in the negative. *Paul v. Paul*, 11 St. Rep. 71; *Church v. Church*, 7 St. Rep. 77. The entrance in a register by a person whose duty or authority it is to keep such register, is admissible at common law to prove marriage, but not in a case where the keeping of such register was merely optional. *Maxwell v. Chapman*, 8 Barb. 579; *Jackson v. King*, 5 Cowen, 237; *Bradford v. Bradford*, 51 N. Y. 669. Under Domestic Relations Law, Chap. 48, General Laws, Chap. 272, Laws 1896, §§ 14, 15, 16, it is the duty of a minister or magistrate by whom a marriage is solemnized to furnish on request to either party a certificate thereof, which may be filed with the clerk of the city or town where either of the parties reside, and it is further provided that the original certificate and original entry of a copy of the certificate or the entry shall be presumptive evidence of the fact of the marriage.

When the nature of the case admits of no better evidence a marriage may be proved by hearsay. Such evidence is not conclusive but is admissible. *Chamberlain v. Chamberlain*, 71 N. Y. 423. A letter written to nephew of the husband congratulating him upon his marriage, and expressing the hope to see him and signed aunt, is admissible. *Badger v. Badger*, 88 N. Y. 546. In order to make evidence that the alleged husband or wife was reputed to be unmarried admissible, it must be shown that the repute was among persons who knew of the existing cohabitation. *Bartlett v. Misliner*, 28 Hun. 235; *Bad-*

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ger v. Badger, 88 N. Y. 546. As to what evidence is not competent on this point, see *Matter of Taylor*, 9 Paige, 611. Testimony by the defendant that the acts relied upon to show the adultery was performed by him with the privity, procurement, collusion and connivance of plaintiff so that she might secure a divorce is admissible. *Huntley v. Huntley*, 57 St. Rep. 287, 73 Hun, 261, 26 Supp. 266. A wife's evidence in divorce pointing to her husband's adultery, is incompetent and will not be considered for any purpose, even if received without objection by defendant. *Fanning v. Fanning*, 20 Supp. 849.

While a husband and wife may not testify against each other, they may testify in each other's favor. *Bailey v. Bailey*, 41 Hun, 424; this was cited in 1866, in *Dickinson v. Dickinson*, 63 Hun, 516, 45 St. Rep. 323, 18 Supp. 485. Under § 831, a husband or wife is not competent to testify against the other on the trial of an action for a hearing on the merits of a special proceeding founded on the allegation of adultery except to prove the marriage or to disprove the allegation of adultery, but husband or wife under this provision are witnesses subject to the general rules of evidence to give all material testimony to show that the allegation of adultery is untrue, and is not confined simply to denying such allegation. *Irish v. Irish*, 12 Civ. Pro. 181; *Stevens v. Stevens*, 54 Hun, 490, 27 St. Rep. 602, 8 Supp. 47; *Stefens v. Stefens*, 16 Daly, 363, 38 St. Rep. 643, 19 Civ. Pro. 267, 11 Supp. 424.

Where a successful party to an action for divorce for adultery marries again he is not guilty of adultery by cohabitation with his new wife during a period prior to reversal of the judgment on appeal. *Bailey v. Bailey*, 45 Hun, 278.

A person who fraudulently procures a divorce in a foreign jurisdiction and then marries and returns to his original domicile, is guilty of adultery notwithstanding the validity of the marriage, so far as the right of the first wife to divorce is concerned. *Munson v. Munson*, 14 Supp. 692.

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Causes of action for divorce for adultery, and on the ground of cruel and inhuman treatment could not be united. *Johnson v. Johnson*, 6 Johns. Ch. 163; *Pomcroy v. Pomcroy*, 1 Johns. Ch. 606; *McIntosh v. McIntosh*, 12 How. 289; *Henry v. Henry*, 17 Abb.

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411; *McNamara v. McNamara*, 9 Abb. 18; *Burdell v. Burdell*, 2 Barb. 473. But in *Doc v. Roc*, 23 Hun, 19, it is queried whether or not, under the present practice, a cause of action for divorce on the ground of adultery can be united with one for a limited divorce on the ground of cruel treatment. Under § 1770 either defence may be interposed as a counterclaim. In divorce, plaintiff may be required to furnish a bill of particulars under certain circumstances, but it is not allowed as a matter of course, as where the complaint does not state the times when, or the name of the party with whom the adultery was committed. *Ansert v. Ansert*, 2 Law Bull. 19. An allegation of abandonment in a complaint for divorce for adultery may be stricken out. *Ward v. Ward*, 5 Abb. (N. S.) 145. An order made seven years after action brought, which changed an action for separation into one for divorce, without personal service on defendant, though his whereabouts were known, *held*, unauthorized. *Robertson v. Robertson*, 9 Daly, 44. Plaintiff may bring a second action for adultery with a person named in first one, and is not bound to resort to supplemental complaint. *Cordier v. Cordier*, 26 How. 187. A supplemental answer may be served on discovery of plaintiff's adultery after issue joined. *Strong v. Strong*, 4 Robt. 669; *Smith v. Smith*, 4 Paige, 432.

If the defendant abandons her defence, but the complainant's motion for a decree is denied on the merits, he is responsible for the wife's costs and counsel fees. *Mouense v. Mouense*, 3 Alb. L. J. 49. The granting of a new trial in a divorce case is determinable by the rules which prevail in a court of equity. Unless the alleged errors be such as to render the trial an unfair one or substantially affect the verdict, a new trial will be denied. *Forrest v. Forrest*, 25 N. Y. 501. The plaintiff will not be permitted to discontinue where the answer sets up adultery, on his part, and asks for a decree, especially after the reference of an application for counsel fees and temporary alimony. *Campbell v. Campbell*, 12 Hun, 636. An alleged *particeps criminis* cannot be made a party on her own application, but she will be allowed to appear, examine witnesses and testify, and to produce witnesses. *Clay v. Clay*, 21 Hun, 609; same principal, *Tilby v. Hayes*, 27 Hun, 251; 21 Hun; distinguished and commented on in *Quigley v. Quigley*, 45 Hun, 23, 9 St. Rep. 486. Where both parties have been guilty of adultery, neither can have a divorce. *Peck v. Peck*,

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44 Hun, 290. The defendant in an action for divorce, having failed to pay alimony as directed, his answer was stricken out, and judgment went against him by default. On a subsequent application to open the default, it was held, by the General Term, that he was in contempt, and the order granting leave to come in was unwarranted and should be reversed. *Quigley v. Quigley*, 45 Hun, 26, citing *Farnham v. Farnham*, 9 How. 231; *Walker v. Walker*, 20 Hun, 400, affirmed, 82 N. Y. 260; *Brinkley v. Brinkley*, 47 N. Y. 40. The defense of adultery, on the part of the plaintiff, is an issue which it is error for the referee to refuse to pass upon. *Price v. Price*, 9 Abb. (N. S.) 291; *Church v. Church*, 7 State Rep. 177.

That the answer of the party, failing to comply with terms imposed by way of alimony and counsel fees, may be stricken out is also held in *Brisbane v. Brisbane*, 5 Civ. Pro. Rep. 352; *Clark v. Clark*, 1 State Rep. 287. Where, pending the suit, the husband made a provision for his wife on a contract between them to live separately, the court refused to discontinue the suit based upon such contract. *Rogers v. Rogers*, 4 Paige, 516. The wife, having the right to sue in her own name for a divorce, has the capacity to agree upon a settlement. *Adams v. Adams*, 24 Hun, 401. Plaintiff having commenced an action against defendant, her husband, for divorce a *vinculo*, and having examined a witness, conditionally, who testified to the acts of adultery charged, in consideration of the husband executing to her father a note for \$1,000, agreed to, and did, discontinue the action without costs. In an action on the note, *held*, it was given for a good consideration and was valid, and not against public policy. *Adams v. Adams*, 91 N. Y. 381. A wife, discovering that her husband had a former wife living, separated from him, and upon his commencing illicit relations with a third person, she sued for divorce. *Held*, that the husband was not, by his marriage with plaintiff, estopped from alleging and proving his former marriage as a bar to the action, and he might set that up as a ground of affirmative relief, which might entitle him to a decree of nullity of the second marriage, and which would preclude her claiming further alimony. *Finn v. Finn*, 62 How. 83. A divorce suit was not allowed to be discontinued in *Bass v. Bass*, 5 Law Bull. 44, till counsel was paid, though the parties were reconciled.

Plaintiff was divorced at suit of his wife and married again; the second wife sued for divorce, and pending the action the for-

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mer decree was annulled on application of the first wife; he sought to set this up as a defence to the second action, but was refused leave to file an amended or supplemental answer; *held*, he could not enjoin the action by the second wife; *held*, also, per Pratt, J., that "The position of being married to two woman at once may well have its inconveniences, but the court is not responsible for them." *Von Prochazka v. Von Prochazka*, 3 Supp. 301.

Where the marriage is not denied, the public has no such interest in an action for divorce as to prevent its discontinuance, and the fact that the wife's character is aspersed is not sufficient ground for denying an application therefor. Upon discontinuance of an action brought against the wife for divorce, she is not entitled to an allowance for counsel fee. *Moore v. Moore*, 51 St. Rep. 911, 22 Supp. 450; appeal dismissed in 138 N. Y. 679, 53 St. Rep. 301, distinguishing *Winans v. Winans*, 124 N. Y. 140, holding that the rule which governs in ordinary cases is not to be strictly applied in actions for divorce, that the rights of the parties to the record are not alone to be considered, but that the public is to be regarded as a party and must be so treated by the court, and that for this reason the court is invested with the wider discretion in the control of such cases than of others.

In the absence of collusion or fraud, a designation as referee in a contested action for divorce, of a person named by a party, is at most an irregularity which can be waived, and it is waived by the party accepting the benefit of the order in putting the case over the term. Rule 72, relating to the appointment of referees in actions for divorce has no application to contested cases, and § 1012 of the Code does not prevent the court from designating a referee from the names suggested by counsel. *Ives v. Ives*, 7 Misc. 328, 28 Supp. 170, 58 St. Rep. 558. It was held on appeal in this action that an order of reference in an action for divorce which designates a referee agreed upon by counsel for the parties, is irregular in that respect, but such irregularity does not require a vacation of the entire order where the original consent to refer was general and the designation was afterward made by the court. *Ives v. Ives*, 80 Hun. 136, 61 St. Rep. 657, 29 Supp. 1053. The order granted below was modified by striking therefrom the name of the person designated as referee and allowing either party to apply, upon notice, to a Special Term for the appointment of a new referee, it being held that the spirit and intent of § 1012 is

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that the court, when a reference of an action brought for a divorce has already been consented to, must name a referee of its own motion and without the consent or agreement as to the person to be named of the counsel or parties.

Where an order of reference was entered by consent, and after one hearing plaintiff moved to vacate the order and asked for a jury trial, it was a matter of discretion and not of right and not reviewable in Court of Appeals. *Winans v. Winans*, 124 N. Y. 140.

In an action for divorce in which the marriage is denied, the defendant is entitled to a bill of particulars as to the time and place of the alleged marriage, and the person by whom it was celebrated, if any, but not as to cohabitation. *Bullock v. Bullock*, 85 Hun, 373, 32 Supp. 1009, 66 St. Rep. 493. A bill of particulars should not be ordered in the action for divorce where the complaint names the places where the alleged adulteries were committed and names at least one of the correspondents. *Oviatt v. Oviatt*, 14 Misc. 127, 35 Supp. 654. But an answer in an action for divorce alleging adultery by plaintiff in a certain city with persons whose names were unknown, cannot be required to be made more definite and certain; the remedy is by a bill of particulars. *Kelly v. Kelly*, 12 Misc. 457, 34 Supp. 255, 68 St. Rep. 133. Where in an action for absolute divorce, all that defendant required to raise the issue was a denial of the allegations of the complaint, *held*, the motion for a bill of particulars before answer was properly denied, but this did not preclude him from obtaining one after issue joined in order to prepare for his defence, and leave for such motion should be granted. *Bullock v. Bullock*, 85 Hun, 373, 66 St. Rep. 493, 32 Supp. 1009.

The affidavit of an attorney in an action of divorce is insufficient to entitle defendant to a bill of particulars, as it fails to establish ignorance on the part of defendant of the facts sought to be disclosed. *De Carrillo v. De Carrillo*, 53 Hun, 359.

Where a direction to the jury to find in a particular manner was given upon a misapprehension, the court may disregard the finding and determine the fact according to the truth of the matter. On a trial for a divorce the court should make a decision concisely stating the grounds on which the issues are decided. *Lowenthal v. Lowenthal*, 92 Hun, 385, 36 N. Y. Supp. 1053, 72 St. Rep. 276.

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SUB. 5. TRIAL.

Public policy, Code of Civil Procedure and the general rules of practice forbid the reference of a matrimonial action to a referee agreed upon by the parties. Such a reference is not a mere irregularity, but the proceedings are void and the reference fails. It is erroneous for the court to appoint a new referee. *Pratt v. Pratt*, 2 App. Div. 534.

See § 1012, Code of Civil Procedure.—The provisions of rule 72, cited *ante*, prohibit a reference to a person named by either party, or to a referee agreed upon by both parties; but a reference in divorce to a referee upon consent is not void, only irregular. *Fullmer v. Fullmer*, 6 Week. Dig. 42. Where issues have been joined, a reference to take proof of the facts and report cannot be ordered even by consent; there can only be a reference to hear and determine all the issues. *Harper v. Harper*, 5 Week. Dig. 460; *Sullivan v. Sullivan*, 41 Super. Ct. 519; *McCleary v. McCleary*, 17 Week. Dig. 182. In the latter case the opinion of Follett, J., at Special Term, cites the authorities bearing on this question, including those *supra*. See, also, opinion General Term, per Learned, P. J. A referee's report in divorce must find on all the questions that may be material to the issues on both sides, and as to guilt of plaintiff when in an issue. *Price v. Price*, 9 Abb. (N. S.) 291.

Where an action of divorce was referred, the adultery of the plaintiff, being alleged in the answer, became an issue in the case, and must be determined by the trial; and the court could not assume that a conclusion of law found by the referee, that the plaintiff was entitled to judgment, was a finding of this issue in the negative. Judgment for divorce reversed. *Church v. Church*, 7 St. Rep. 177; *Paul v. Paul*, 11 St. Rep. 71. Parties asking the intervention of the court for relief by way of divorce must prove a full and complete case; nothing is to be taken in favor of the applicant by presumption or intendment as to the facts, even in case of a default or at the hearing. *Linden v. Linden*, 36 Barb. 61.

The referee must find not only as to the fact of adultery, but as to all the material facts. *Dodge v. Dodge*, 7 Paige, 589; *Arborgast v. Arborgast*, 8 How. 297; *Myers v. Myers*, 41 Barb. 114. If issue is joined the referee must determine the issue. *Merrill v.*

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Merrill, 11 Abb. (N. S.) 74. Where the answer contained specific recriminating charges of adultery, a finding that plaintiff is "guilty as charged in the answer" is sufficient under the Code requiring such decision to contain a statement of the facts and the conclusions of law separately. *Pollock v. Pollock*, 71 N. Y. 137. There is no command in the statute that the facts required by it to be proved shall constitute a part of the record. If the court is satisfied by the proof, no matter whether made by the referee or court, it is sufficient. *Wells v. Wells*, 10 St. Rep. 248.

Where the parties have stipulated for a reference of the issues, the court has no authority, in the absence of a reason sufficient in law, to vacate the order of reference and direct a jury trial. *Ryerson v. Ryerson*, 55 Hun, 191, 27 St. Rep. 945, 7 Supp. 726.

A defendant in an action for a divorce is entitled of right to a trial by jury and such right is not lost by delay to have issues framed. *Ulbricht v. Ulbricht*, 89 Hun, 479, 35 Supp. 324.

In an action by a wife for divorce on the ground of adultery, where the case is litigated, it is not incumbent upon the plaintiff to make affirmative proof of the allegations inserted in her complaint in compliance with Rule 73 (now 72), that the adultery charged was "without the consent, privity or procurement of the plaintiff," and that the latter has not voluntarily cohabited with the defendant since discovery of the fact. These are matters of affirmative defence; it is only to provide for a case of defendant suffering a default that these possible defences are required to be negatived by plaintiff by a verified complaint or affidavit. Where in such an action charges of adultery in the complaint are put in issue by the answer, counter-allegations of adultery on the part of plaintiff are made and the issues are tried together; the reception of testimony of plaintiff incompetent under the code, as to the issues presented upon the charges in the complaint, but which is competent upon the issues presented by the counter-charges in the answer, is not error. *McCarthy v. McCarthy*, 143 N. Y. 235.

Report of Referee to Hear and Determine Issues in Divorce.

SUPREME COURT — COUNTY OF ULSTER.

EMILY C. COUTANT

agst.

AARON T. COUTANT.

To the Supreme Court :

The undersigned, heretofore appointed referee herein, respectfully reports: I have been attended by the parties and their counsel, and have heard their proofs and allegations, and after due deliberation thereon I find as matters of fact:

First. That on the 15th day of November, 1875, the parties intermarried, at the town of Esopus, in this county and State, and thereafter, for some time since, lived together as husband and wife; that during said time they had one child, Grace Ethel, now about eight years of age.

Second. That at the time of such marriage both parties were, now are, and, at the time of the commission of the adultery herein-after mentioned, were inhabitants of this State.

Third. That on or about the 14th day of November, 1879, the defendant herein, claiming to be a resident of the State of Iowa, procured, from the Circuit Court of Chickasaw county, in said State, a judgment or decree purporting to dissolve the bonds of matrimony between himself and the plaintiff; that the plaintiff herein was not personally served with the process in the suit, in which said judgment or decree was obtained, did not appear therein, and was not, during the time of the pendency thereof, an inhabitant of the State of Iowa.

Fourth. That on the 26th day of March, 1884, a marriage ceremony was performed, at Rosendale, in this State, between one Rachel Jane Hasbrouck and the defendant, and the said defendant and Rachel Jane Hasbrouck have ever since lived and cohabited together as husband and wife.

Fifth. That said adultery was committed without the consent, connivance, privity or procurement of the plaintiff; that the plaintiff has not cohabited with the defendant since the discovery by her of such adulterous intercourse; that there is no judgment or decree against her on behalf of defendant in any of the courts of this State on the ground of adultery.

I find as conclusions of law:

First. That a divorce should be decreed in favor of the plaintiff and against the defendant on the ground of his said adultery.

Second. That the custody of said child should be awarded the plaintiff.

Third. That plaintiff should have judgment for the costs of this action against the defendant; the oral proofs are annexed hereto.

Dated March 20, 1885.

JOHN J. LINSON,

Referee.

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SUB. 6. COSTS AND APPEAL.

On a decree for divorce against the wife, no costs are given. *De Rose v. De Rose*, Hopk. 100. If the husband allows the bill to go as confessed, costs are of course, and a reasonable counsel fee. *Graves v. Graves*, 2 Paige, 62. A wife may compromise her suit for divorce without regard to her solicitor's claim for costs. *Kirby v. Kirby*, 1 Paige, 565. Where the parties become reconciled, the husband is not liable for the costs of the wife's attorneys. *Phillips v. Simmons*, 20 How. 342. As to effect of refusal of wife to abide by settlement, see *Bolen v. Bolen*, 44 Hun, 362.

Where a compromise was made, and the husband was to pay the costs of his wife's attorney, and he afterward served a verified answer and refused to pay the obligation, *held*, that the court had power, upon the application of the wife, to compel him to pay the costs and expenses as fixed by the court. *Smith v. Smith*, 35 Hun, 378, affirmed, 99 N. Y. 639. Where there is reason to believe that both parties have through detectives employed for that purpose, procured false testimony, no costs will be allowed. *Beadleston v. Beadleston*, 2 Supp. 809.

In an action brought by the wife for a limited divorce, a judgment dismissing the complaint was entered on the report of the referee. Plaintiff, having appealed from the judgment, moved for an order requiring defendant to furnish means to enable her to print the papers on appeal. *Held*, that the court properly denied the motion, because of a want of power to make the order after the entry of judgment; but the order was modified so as to allow plaintiff to bring the case to a hearing upon written papers. *Fagan v. Fagan*, 39 Hun, 531. Where in an action for divorce for adultery, a judgment for defendant, which is reversed by the General Term on questions of fact, and new trial ordered, an appeal may be taken to the Court of Appeals, and, in case of affirmance, judgment absolute can be rendered against appellant, as the question of fact has been tried at General Term and in Court of Appeals, and the decision is that defendant is guilty. *Conger v. Conger*, 77 N. Y. 432.

An undertaking given pursuant to § 1327 stays all proceedings pending an appeal. *Samuels v. Samuels*, 1 Supp. 787. But where the judgment required plaintiff to give as security for pay-

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ment of alimony, security by way of mortgage on real estate, it was held that to stay proceedings pending an appeal, defendant must also execute and deposit with the clerk the mortgage so required. *Galusha v. Galusha*, 108 N. Y. 114.

ARTICLE IV.

JUDGMENT AND ITS EFFECT. §§ 1759, 1760, 1761.

SUB. 1. JUDGMENT HOW OBTAINED.

2. EFFECT OF JUDGMENT. §§ 1759, 1760, 1761.

3. VACATING JUDGMENT.

SUB. 1. JUDGMENT HOW OBTAINED.

No judgment for divorce, whether after the trial of an issue or otherwise, can be entered except upon the special direction of the court. A default does not, as in other cases, supersede the necessity of proof or lighten the burden of plaintiff in establishing the allegation. Satisfactory proof is required in all cases, not in favor of the party who makes the default or confesses the action, but to satisfy the conscience of the court that there is no collusion between the parties and that there is legal cause of divorce. The injunction that no divorce shall be granted without satisfactory proof imposes the duty of passing upon the facts, and is inconsistent with the right of the party to enter judgment without an examination by the court and without direction of the court. The report should be brought before the court, together with the evidence. *Blott v. Rider*, 47 How. 90. Proof must be taken, not only of the adultery, but of all the facts material to the jurisdiction, and also as to whether there has been any condonation. *Pugsley v. Pugsley*, 9 Paige, 589; *Turney v. Turney*, 4 Edw. 566; *Dobbs v. Dobbs*, 3 Edw. 377; *Arborgast v. Arborgast*, 8 How. 297. The proof must correspond with the allegations in the complaint. Where the complaint contains an allegation of adultery with a particular person, evidence of adultery with another person is not sufficient. *Bokel v. Bokel*, 3 Edw. 376; *Kane v. Kane*, 3 Edw. 389. And it is the duty of the court to examine the complaint as well as the proofs to ascertain whether a cause of action is made out as stated in the complaint. *Robinson v. Robinson*, 1 Barb. 27. Where the proof is insufficient as to all the material facts charged in the complaint, plaintiff may take an

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order re-committing the report to the referee for further proof. *Arborgast v. Arborgast*, 8 How. 297; *Zorkowski v. Zorkowski*, 27 How. 37. Where the reference is to report the evidence with the referee's opinion, all evidence not pertinent to the issues should be rejected as on a trial. *Ager v. Ager*, 1 Law Bull. 20.

§ 1229. In matrimonial causes judgment can be rendered only by the court.

In an action to annul a marriage, or for a divorce or separation, judgment cannot be taken, of course, upon a referee's report, as prescribed in the last section, or where the reference was made as prescribed in section one thousand two hundred and fifteen of this act. Where a reference is made in such an action the testimony, and the other proceedings upon the reference, must be certified to the court, by the referee, with his report, and judgment must be rendered by the court.

Rules cited *supra* also provide that application for a judgment must be made to the court.

Upon the hearing of a motion for leave to enter judgment upon the report of a referee appointed by the court to hear and determine the issues in an action for divorce on the ground of adultery, the court cannot set aside the report on the ground that the evidence is insufficient to sustain the findings, and direct a judgment to be entered in favor of the party against whom the referee awarded a judgment. The Legislature, by § 1229, did not intend to authorize the court to examine the evidence and to render such judgment as it would justify, but only required the approval of the court as a safeguard against irregularity, fraud or collusion. *Schroelster v. Schroelster*, 23 Hun, 230. Though the referee determines the issues in favor of a divorce, the court may, on hearing exceptions to the report, withhold judgment for insufficiency of proof of adultery or for condonation, but it cannot dismiss the case on the merits. *Harding v. Harding*, 43 Super. Ct. 27.

No judgment should be entered without application to the court, and the report of the referee is said not to be conclusive as to the facts. *Greene v. Greene*, 14 Week. Dig. 159. The judge to whom the report of a referee, determining the issues in divorce, is presented, should, on application for judgment therein, review the facts found and the conclusions reached by the referee, and refuse judgment on the ground that the evidence is inadequate. Plaintiff's remedy is by appeal. *Malcolm v. Foster*, 5 Week. Dig. 310. It was referred to take proofs and

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report with the referee's opinion; on motion the court set aside the report and gave judgment for defendant. *Held*, error; the issues should have been tried by the court, the facts found and a case settled. *Meyer v. Meyer*, 7 Week. Dig. 535.

Although the evidence to prove adultery is positive, the conclusion of the referee is not binding upon the court where it is not based upon the credibility of the witness from whom it was obtained, but is the result of all the evidence as submitted, part of which was improperly admitted. *Moore v. Moore*, 14 Week. Dig. 255. In *Ross v. Ross*, 31 Hun, 140, it is held, that upon an application to confirm the report of a referee in divorce a Special Term has no power to examine the case upon the merits or reverse the report for error or irregularities committed upon the trial. It can only refuse to confirm the report where fraud, collusion, or some similar cause be proved. If, for any reason, the proceedings before the referee do not warrant the entry of a judgment conforming to his decision, no judgment can be rendered, and the motion for judgment must be simply denied, and the party who desires further relief must make application therefor. Citing 23 Hun, 230, *supra*, and *Anonyms*, 3 Abb. N. C. 161. These cases are all cited with approval and same rule held in *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236; same rule, *Rice v. Rice*, 22 Week. Dig. 258. It is said in *Westheimer v. Westheimer*, 1 Law Bull. 34, and *Smith v. Smith*, 4 Law Bull. 57, that where the reference has been to take testimony and report, the case must be brought on for trial at Special Term on the report. It is held in *Bloodgood v. Bloodgood*, N. Y. Daily Reg. April, 1884, Abbott's Annual, 1884, page 111, that in addition to fraud and collusion the court may refuse to confirm referee's report, if for any reason the proceedings do not warrant the entry of a judgment conformably to his decision, and in such case the motion to confirm may be denied. The rule seems to be settled, therefore, as in *Ross v. Ross*, 31 Hun, 140, *supra*, that, on the bringing in of the report of a referee to hear and determine the issues, the court can only refuse to confirm for fraud, collusion, or some similar cause. The practice seems equally well settled that on a report of a referee, appointed on default to take proof and report with his opinion, that the court passes upon all the questions and can grant judgment, or send back the report for further evidence.

The court, at Special Term, has not the power to review the

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findings and the decision of the referee, that can only be done by appeal to the General Term. *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236. The authorities on this subject up to that date are collated in *McCleary v. McCleary*, 30 Hun, 154.

Upon application to the Special Term for judgment upon the report of a referee to hear and decide, the court will not examine the case upon the merits or set aside the report for errors committed upon the trial; it will only make such examination as may be necessary to ascertain whether the report has any support in the evidence or whether there has been fraud or collusion or any evil practice in the case by either party. After such examination the application for judgment will be either granted or denied. It is beyond the province of the court upon such a motion to set aside the report and direct the issues to be tried at the circuit. *Ryerson v. Ryerson*, 55 Hun, 191, 27 St. Rep. 945, 7 Supp. 726, citing *Matthews v. Matthews*, 53 Hun, 244, holding that where a referee has been appointed "with power to take the testimony and report the same with his findings of fact to the court" and the referee reports in favor of defendant, the Special Term is not authorized to set aside the report and send the case back to the referee with orders to him to take further testimony. An order in such form is in effect an order to hear and determine; but it seems that the court may, on the ground of insufficient proof, refuse to authorize the entry of a judgment for divorce although the referee has decided that it should be granted. This case is cited in *Huntley v. Huntley*, 73 Hun, 261, which holds that in an action brought to obtain an absolute divorce, the Special Term has no power after a trial before a referee to examine the case upon the merits or to reverse the report of the referee for errors or irregularities committed on the trial, and the only manner in which the trial before the referee can be reviewed is by an appeal to the General Term.

Though the judgment in divorce cases is rendered by the court, the decision of the referee should stand as a guide for the court unless some unjust or inadvertent ruling tending to destroy the safeguards around the marriage tie is made. *Smith v. Smith*, 7 Misc. 305, 58 St. Rep. 552, 23 Civ. Pro. R. 386, 28 Supp. 136. It was further held in that case, upon a motion to confirm the report of a referee who found that defendant who had sued for divorce had not committed adultery but that plaintiff had,

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that the court would not consider the evidence which was conflicting.

A refusal to confirm a referee's report at chambers was sustained in *Johnson v. Johnson*, 4 Supp. 224, although the court did not assign a reason therefor. An order for issues to be tried is not conclusive on the question of form of the pleading or the sufficiency of the issue. *Baumond v. Diecks Pharmacy Co.* 14 Abb. N. C. 100. It is proper for the court, where the issue of adultery has been tried by a jury, to order exceptions to be heard in the first instance at General Term; in such case the verdict of a jury is not simply advisory as in equity cases, but is conclusive unless set aside or a new trial granted. *Carpenter v. Carpenter*, 9 Supp. 583. See Art. III, Sub. 5, and cases cited.

The reference in case where issue is joined should be to hear and decide the issues, and not merely to take evidence and report the same with the referee's opinion. *McCleary v. McCleary*, 30 Hun, 154. An order of reference with power to take the testimony and report the same with his findings of fact to the court is an order of reference to hear and determine. *McCleary v. McCleary*, 30 Hun, 154; *Matthees v. Matthees*, 53 Hun, 244.

Alimony allowed to a wife by the final decree granting her a divorce is not her property or separate estate, and cannot be reached by creditors whose claims and judgment antedate such decree. *Romaine v. Chauncey*, 60 Hun, 479, 39 St. Rep. 480. On appeal, 129 N. Y. 566, the same rule was held, the court taking the ground that alimony awarded to an innocent wife by a court of equity as incidental to a decree of divorce in her favor, is simply an allowance for her support and maintenance, the awarding it is not the enforcement of a debt due to her from her husband, but the marital obligation of support from which the husband because of his misconduct is not relieved by the decree. The allowance becomes a debt only in the sense that the general duty has been changed to a specific duty by fixing the amount payable to the wife for such support, and that while alimony is in one sense property of the wife, it is a specific fund provided for a specific purpose; an express limitation to take it out of the general law of property being created by equity, it should have the protection of equity so that it may not be perverted for a purpose for which it was not intended. Per Finch, J., all concurring, followed *Andrews v. Whitney*, 82 Hun, 117.

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The Code, § 1759, sub. 2, and § 1771, now require that an application for an allowance in the nature of alimony must be made before and be contained in the final judgment, where the action is for a divorce. It is otherwise where the action is for a separation, and an application to have the judgment modified so as to provide for payment by the husband of sums for the education and maintenance of the children was held to be properly refused on the ground that the court had no power after the entry of final judgment to modify it. The former rule allowing such application to be made after judgment in an action for a divorce was abrogated by the Code of Civil Procedure. *Chamberlain v. Chamberlain*, 63 Hun, 96, 43 St. Rep. 502, citing *Kamp v. Kamp*, 59 N. Y. 212, and refusing to follow *Wells v. Wells*, 10 St. Rep. 248.

The rule with regard to allowance of counsel fees and expenses for support and maintenance of the wife seems to be that expenses *pendente lite*, if they are to be awarded at all in an action for divorce, must be awarded on motion, and cannot properly form a part of the final judgment so that no allowance can be made in the final judgment for expenses of the action by the wife, but past expenses of the wife for support and maintenance can be provided for. Such allowance, it seems, is authorized by § 1766 of the Code. It does not provide for costs and expenses of the action which are provided for under § 1769. *Straus v. Straus*, 67 Hun, 491, citing *Percival v. Percival*, 14 St. Rep. 255, 124 N. Y. 637; *McBride v. McBride*, 119 N. Y. 519.

Judgment.

SUPREME COURT.

EMILY C. COUTANT <i>agst.</i> AARON T. COUTANT.

This action having been heretofore duly referred to John J. Linson, as sole referee, and the said referee having made and filed his report, bearing date March 20, 1885, and said report having been, in all things, confirmed by the court and judgment directed accordingly: Now, on motion of D. W. Sparling, attorney for plaintiff, it is ordered and adjudged that the marriage between the said plaintiff, Emily C. Coutant, and the defendant, Aaron T. Coutant, be

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dissolved, and the same is hereby dissolved accordingly; and the said parties are, and each of them is, freed from the obligations thereof.

And it is further adjudged that it shall be lawful for the said Emily C. Coutant, the plaintiff, to marry again in the same manner as if the said Aaron T. Coutant, the defendant, was actually dead, but it shall not be lawful for the said Aaron T. Coutant, the defendant, to marry again until the said Emily C. Coutant shall be actually dead. And it is further ordered and adjudged that the custody of Grace Ethel Coutant, the child of said marriage, is hereby awarded to the said plaintiff, Emily C. Coutant.

MARTIN S. DECKER,
Deputy Clerk.

Form of Judgment.

At a Special Term of the Supreme Court held in part first of said court in the county court house in the city and county of New York on the 8th day of April, 1892.

Present — Hon. George C. Barrett, *Justice*.

ELIZABETH MERCER, PLAINTIFF,

agst.

WILLIAM STUART MERCER, DEFENDANT.

73 Hun, 172.

This cause coming on regularly to be tried by this court at a Special Term thereof held by the undersigned without a jury, and having been tried on the 24th and 28th days of March, 1892, and satisfactory evidence having been produced to the court on the part of the plaintiff, proving the material allegations of the complaint, and the court having decided that the plaintiff herein is entitled to a judgment of absolute divorce from the defendant herein, dissolving her marriage with him, and freeing her from the obligations thereof, and having directed this judgment entered herein, and having granted by an order entered herein on the 12th day of April, 1892, an allowance for counsel fee to said plaintiff herein, and having directed that the same may be included in this judgment,

Now, on motion of F. De Lysle Smith, attorney for said plaintiff, it is hereby ordered that the marriage between the said plaintiff Elizabeth Mercer and the said defendant William Stuart Mercer, be and the same is hereby dissolved, and the said parties are and each of them is free from the obligations thereof; that it shall be lawful for the said Elizabeth Mercer, the plaintiff, to resume her former or maiden name and to marry again in same manner as if the said William Stuart Mercer, the defendant, were actually dead, but it shall not be lawful for the said William Stuart Mercer, the defendant, to marry any other person until the said plaintiff be actually dead; that said defendant William Stuart Mercer pay twelve hundred dollars per annum as alimony for the support and maintenance of the said plaintiff Elizabeth Mercer, during her natural life, the same to be

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from the date of the entry of this judgment on the 28th day of each and every month and until further order herein to F. De Lysle Smith, plaintiff's attorney of record herein, at his office in the city of New York, and that such payment or payments of said alimony are not to be in lieu of said plaintiff's right of dower in said defendant's estate or interest in his personal property in case of his death intestate.

That said defendant, William Stuart Mercer, within twenty days from the entry of judgment herein, give to the clerk of this court security to be approved by one of the justices thereof for the payment at such time and place as is herein directed of the said allowance for the support and maintenance of the said plaintiff Elizabeth Mercer, that if any event shall occur changing the circumstances of the said parties herein or either of them, the said plaintiff Elizabeth Mercer may make application on the foot of this judgment for such modification thereof touching the said allowance herein adjudged for alimony as may be just;

That said defendant William Stuart Mercer pay to F. De Lysle Smith, said plaintiff's attorney, on or before the 12th day of May, 1892, the sum of \$500, as directed by the order of this court, entered herein on the 12th day of April, 1892, being the sum allowed by said order as a counsel fee to said plaintiff, and that said defendant give to the clerk of this court security for the payment of said allowance for counsel fee within the time and according to the terms by said order directed.

That said plaintiff, Elizabeth Mercer, have the costs and disbursements of this action, which have been taxed at \$178.61, against the said defendant, and that the said defendant pay the said costs and disbursements to F. De Lysle Smith, the said plaintiff's attorney, at his office in the city of New York, on or before the 12th day of May, 1892, and that said plaintiff have execution from time to time against the said defendant William Stuart Mercer for the collection of said costs and disbursements and the moneys herein adjudged to be paid for said plaintiff's support and maintenance and for her said counsel fees.

GEORGE C. BARRETT,

Justice Sup. Ct.

Precedent for Judgment.

At a Special (Equity) Term of the Supreme Court held in the court house in Rochester, Monroe county, on the 10th day of February, 1886.

Present — Hon. William Rumsey, *Justice*.

SARAH F. GALUSHA

agst.

NORMAN H. GALUSHA.

116 N. Y. 635.

This action having been tried by a court without a jury and the decision of the court thereon having been rendered and filed whereby

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among other things, it is decided that the parties hereto were on the 28th day of October, 1858, married at Rochester, N. Y., aforesaid, continued to live together as husband and wife until April, 1883, at Rochester aforesaid, and were at the time of the commission of the several acts of adultery hereinafter mentioned, residents and inhabitants of this State; that no child was ever born as the issue of such marriage; that the defendant is guilty of the commission of the several acts of adultery charged in the complaint to have been committed with one Jessie L. Kellinger; that all such acts of adultery were committed by the defendant without the consent, connivance, privity or procurement of the plaintiff, and five years have not elapsed since the plaintiff discovered the fact of such adultery or the commencement of such adulterous intercourse, and the plaintiff has not voluntarily cohabited with the defendant since the discovery of said acts of adultery or the commencement of said adulterous intercourse; that the defendant is worth in real and personal property, over and above his debts, at least the sum of \$150,000, and is in receipt of an annual income of at least \$7,500, and that the plaintiff is entitled to a judgment herein in her favor against the said defendant, dissolving said marriage between them on account of the adultery so committed by him, and to an allowance for permanent alimony as hereinafter provided and to be paid and secured as hereinafter provided.

Now, on motion of J. A. Stull, of counsel for plaintiff, and after hearing William H. Bowman of counsel for defendant, and this court having upon the evidence and proofs before it, considered and determined that the allowance for the support of the plaintiff is just, having regard to the circumstances of the parties, respectively,

It is ordered, decreed and adjudged, and this court, by virtue of the power and authority therein vested and in pursuance of the statutes in such cases made and provided, doth order, decree and adjudge that the marriage between the said plaintiff Sarah F. Galusha, and the defendant Norman H. Galusha, be dissolved and the same is hereby dissolved accordingly, and the parties are and each of them is free from the obligations thereof, and

It is further ordered, adjudged and decreed, that it shall be lawful for the said Sarah F. Galusha, the plaintiff, to marry again, in the same manner as if the said Norman H. Galusha, the defendant, was actually dead, but it shall not be lawful for the said Norman H. Galusha, the defendant, to marry again until the said Sarah F. Galusha, the plaintiff, shall be actually dead, and

It is further ordered, adjudged and decreed, that the said Norman H. Galusha, the defendant, pay to the said Sarah F. Galusha, the plaintiff, the sum of \$3,750 a year from the first day of February, 1886, during her natural life, as a suitable allowance to the said Sarah F. Galusha, the plaintiff, for her support, and that such allowance be paid in manner following, that is to say, that the sum of \$937.50 be paid as aforesaid into the hands or upon the order of said plaintiff or her attorneys of record in this action on the first day of May, in the year 1886, and the like sum of \$937.50 be paid in like manner into the hands or upon the order of said plaintiff or of

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her attorneys of record in this action on the first day of each month of August, November, February and May thereafter during the natural life of the said Sarah F. Galusha, the plaintiff, and

It is further ordered that the said Norman H. Galusha, the defendant, within thirty days from the date of the entry of this order and judgment, give unto the said Sarah F. Galusha, the plaintiff, as security for the payment of such allowance, a mortgage upon his real estate situate in this State or otherwise as may be directed and approved by a justice of this court or by the county judge of Monroe county, and

It is further ordered, adjudged and decreed that the said Norman H. Galusha, the defendant, shall pay to the said plaintiff or her attorneys in this action, the costs of this action which have been adjusted and are hereby allowed at \$492.47, and

It is further ordered, decreed and adjudged that from time to time, as any sum or sums shall become payable by the terms of this order and judgment, the said Sarah F. Galusha, the plaintiff, upon the allowance of any justice of this court to be made on exhibiting to him and filing an affidavit that such sum or sums hath not or have not been paid, may have an order entered as of course on the foot of this order, decree and judgment, that execution issue in such form as said justice may direct, against the said Norman H. Galusha, the defendant, for the sum or sums so unpaid, with interest thereon from the time or times when the same shall have become payable by the terms of this order or judgment,

It is further adjudged that either party may apply to the court from time to time to modify this judgment as to alimony in case of a change of circumstances of the parties or for other good reasons.

SUB. 2. EFFECT OF JUDGMENT. §§ 1759, 1760.

§ 1759. [Am'd, 1895.] **Regulations when action brought by wife.**

Where the action is brought by the wife, the following regulations apply to the proceedings:

1. The legitimacy of any child of the marriage, born or begotten before the commencement of the action, is not affected by the judgment dissolving the marriage.

2. The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties; and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, vary or modify such a direction. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

3. If, when final judgment is rendered, dissolving the marriage, the plaintiff is the owner of any real property; or has, in her possession or under her con-

ART. 4. Judgment and its Effect.

trol any personal property, or thing in action, which was left with her by the defendant, or acquired by her own industry, or given to her by bequest or otherwise; or if she is or may thereafter become entitled to any property, by the decease of a relative intestate; the defendant shall not have any interest therein, absolute or contingent, before or after her death.

4. Where final judgment is rendered dissolving the marriage, the plaintiff's inchoate right of dower, in any real property, of which the defendant then is or was theretofore seized, is not affected by the judgment.

§ 1760. Id.; when action brought by husband.

Where the action is brought by the husband, the following regulations apply to the proceedings:

1. The legitimacy of a child, born or begotten before the commencement of the offence charged, is not affected by a judgment dissolving the marriage; but the legitimacy of any other child of the wife may be determined, as one of the issues in the action. In the absence of proof to the contrary, the legitimacy of all the children, begotten before the commencement of the action, must be presumed.

2. A judgment dissolving the marriage does not impair, or otherwise affect, the plaintiff's rights and interests, in and to any real or personal property which the defendant owns or possesses when the judgment is rendered.

3. Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of the plaintiff's real property, or to a distributive share in his personal property.

A divorce dissolving the marriage contract, on the ground of adultery of the husband, does not deprive the wife of her right to dower in his real estate. A divorce for adultery has no other effect than such as is declared by the statute. *Wait v. Wait*, 4 N. Y. 95. A wife can only be barred of dower by a conviction of adultery in an action of divorce, and by the judgment in such action. An admission of proof of adultery, or a verdict or judgment in any other action, will not work a forfeiture. A cohabitation of the husband with the wife after the commission of adultery by her condones the offence, and is an absolute bar to an action for divorce; and an action for divorce cannot be sustained merely to establish that the offence, which has thus been blotted out, has been committed in order to attach the penalty of forfeiture of dower to the offending wife. *Pitts v. Pitts*, 52 N. Y. 593, affirming 64 Barb. 482. It is only where, upon proof and a finding or verdict of adultery, that the court has, in an action for divorce, given judgment against the wife and dissolved the marriage contract, that the right of dower is lost; the forfeiture is not a consequence of her offence but of the judgment founded thereon. Where, therefore, in an action for divorce *a vinculo*, the referee

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found the wife guilty of the adultery charged, but also found the husband guilty of the same offence and dismissed the complaint, *held*, the wife had not lost her right of dower. *Schiffer v. Pruden*, 64 N. Y. 47. A wife, after divorce, may release her dower to her husband. *Savage v. Crill*, 19 Hun, 4. Misconduct of a wife, which is sufficient to justify an Illinois divorce, is sufficient to bar her dower here. *Van Cleef v. Burns*, 43 Hun, 461. A divorced wife, whether the divorce was granted because of the misconduct of herself or her husband, is not entitled, if he die intestate, to administration, or to a distributive share of his estate. *Matter of Ensign*, 103 N. Y. 284. The authorities upon alimony are all collected under § 1769. To avoid repetition, see that section and § 1766 as to provision for maintenance.

A judgment of divorce rendered by the courts of a State in which both parties are residents, upon substituted service such as is authorized in case of an absent defendant, is valid and conclusive in every other State, although the defendant was temporarily absent from the State and did not appear in the action. *Matter of Denick*, 92 Hun, 161, 36 N. Y. Supp. 518, 71 St. Rep. 549. A decree of divorce procured without notice to the wife in a foreign State to which the husband went after leaving her, is not valid in this State. *People ex rel. Karloise v. Karloise*, 1 App. Div. 571, 37 N. Y. Supp. 481.

A decree of divorce recovered by a wife against her husband who had left the State of their domicile, service being made by publication, and which is valid in the State where rendered, will be held valid here unless it appears that when such action was commenced the husband had acquired a domicile elsewhere. *Campbell v. Campbell*, 90 Hun, 233, 35 N. Y. Supp. 380, 693, 69 St. Rep. 634, 70 St. Rep. 490.

When a court having jurisdiction of the parties and subject-matter decrees an absolute divorce, with leave to the wife to marry again, and she does so marry, her second husband cannot maintain an action to have the judgment of divorce cancelled and his marriage declared void on the ground that the divorce was obtained fraudulently or by collusion. *Ruger v. Heckel*, 85 N. Y. 483, affirming 21 Hun, 489, distinguished, 90 N. Y. 526; *Hall v. Hall*, 6 St. Rep. 92, citing *Davidsburgh v. Knickerbocker Ins. Co.* 90 N. Y. 526. Plaintiff, in an action of divorce, having recovered judgment, died, and the defendants ought to have the judgment

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set aside for fraud and irregularity. *Held*, that she could not obtain relief on notice of motion to plaintiff's administrator. *Watson v. Watson*, 1 Hun, 267. The husband obtained an irregular decree of divorce, and a second wife contracted marriage with him in good faith and had children. *Held*, that though the cause should be opened on the petition of the first wife, to enable her to defend, the decree should be retained meanwhile. *Dunn v. Dunn*, 4 Paige, 425. Where a decree for divorce, for adultery, was regularly obtained by the wife while the husband was a convict in State prison, the court refused to open the decree to enable the husband to set up condonation. *Hoffmire v. Hoffmire*, 7 Paige, 60, affirming 3 Edw. 73. After a divorce has been granted for adultery the court ought not to refuse to open it on sufficient evidence, and without prejudice to rights of third persons. *Colvin v. Colvin*, 2 Paige, 385. The power of the court to open a decree of divorce is not affected by the provisions formerly contained in § 135 of the Code. *Brown v. Brown*, 58 N. Y. 609.

Where the wife has been divorced for her adultery, the court has no power, at the expiration of several years, to modify the decree by an order that she shall have access to her minor child, the custody of which has been committed to the father. *Crimmins v. Crimmins*, 28 Hun, 200. A decree of divorce will not be set aside because the wife had previously contracted another marriage, believing she had the right to do so, nor after several months for the insufficiency of the testimony, unless there was an entire failure of proof, nor because the motion to confirm the referee's report made before one judge was renewed before another, and there was no competent evidence of leave to renew, notice of the second motion having been given, no objection taken at the time. *Robertson v. Robertson*, 9 Daly, 44. Where the decree directs the payment of an annual sum to the wife to defray the expenses of the education of children, the court may subsequently reduce the amount where the burden has ceased. *Kerr v. Kerr*, 9 Daly, 517. A mother, on allegations that a divorce between her daughter and the latter's husband was obtained by collusion, has no right to be made guardian *ad litem*, or to move to open the judgment; but the court will inquire into her statements to see if it has been imposed upon. *E. B. v. E. C. B.* 28 Barb. 299. It is not collusive for defendant, on appeal

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to the Court of Appeals from an order granting a new trial, to stipulate for judgment absolute on affirmance. *Conger v. Conger*, 77 N. Y. 432. In *Cooper v. Cooper*, 1 Law Bull. 82, a decree was opened because obtained by fraud. So also in *Denton v. Denton*, 41 How. 221; *Singer v. Singer*, 41 Barb. 139. But a decree will not be set aside on account of fraud or collusion between plaintiff's attorney and defendant, when plaintiff was not a party to such fraud and collusion, and was entitled to a decree. *Harft v. Harft*, 16 Week. Dig. 461. Judgment may be vacated for irregularities affecting the jurisdiction of the person, even after the prevailing party has been married again; but this power should be exercised rarely. *Wortman v. Wortman*, 19 Abb. 66.

After a divorce on the ground of adultery, the husband cannot remarry, even with the divorced wife. Such remarriage is no bar to proceedings to enforce payment of alimony. *Moore v. Moore*, 8 Abb. N. C. 171. Where a wife has been divorced by her husband, a second marriage by her during the lifetime of the former husband is void, though he may not have been heard of for over five years. *Borrowdale's Estate*, 28 Hun, 336. A decree of divorce, with alimony, absolutely dissolves the marital relation, and the husband cannot thereafter be compelled to furnish money to pay the costs of a new litigation to enforce payment of alimony. *McQuien v. McQuien*, 61 How. 280. After a final decree which is silent as to the custody of the children, the court may subsequently make an order for that purpose without a renewal of the suit, though the wife has married again. *Cook v. Cook*, 1 Barb. Ch. 639. After a judgment in favor of the wife for divorce has been entered, which contains no provision for alimony, nor any reservation of the question for future consideration, the jurisdiction of the court is exhausted, and subsequent proceedings for the obtaining of alimony are absolutely void. *Kamp v. Kamp*, 59 N. Y. 212. Where the court has jurisdiction the decree cannot be attacked collaterally. *Delafield v. Brady*, 108 N. Y. 524. Where husband and wife are seized of a tract of land by the entirety and a divorce is granted on the ground of the wife's adultery, they are thereafter seized as tenants in common. *Steltz v. Schreck*, 10 Supp. 790.

A divorced wife, whether the divorce was granted on account of the misconduct of herself or her husband, is not entitled, if he dies intestate, to administration nor to a distributive share of his

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estate. The provision of the Revised Statute that if the divorce was granted because of the misconduct of the wife she shall not be entitled to "any distributive share of his personal estate," is needless and superfluous. *Estate of Ensign*, 103 N. Y. 284. It seems that the law as to the effect of a decree of divorce in suit brought by husband upon the wife's right of dower, was not changed by chapter 245, Laws 1880, and question is considered as to whether decree dissolving marriage for cause not adequate by Laws of this State, deprives the wife of her then existing dower right in lands in this State. *Van Cleef v. Burns*, 118 N. Y. 549. A decree of divorce does not abrogate prior agreement of separation and for wife's support, at least where no provision is made for alimony in the decree for divorce. *Clark v. Fosdick*, 118 N. Y. 7.

A divorce obtained in the courts of another State by false and fraudulent affidavits of facts necessary under its statutes to authorize the service of a summons by publication, will be treated as a nullity by the courts of this State. *Stanton v. Crosby*, 9 Hun, 370. A divorce granted in another State dissolving a marriage contract in this State in favor of the husband temporarily residing there, upon substituted service upon his wife who resided in this State, and for an alleged cause which did not exist in fact, held, invalid and inoperative as against the wife. *Mellen v. Mellen*, 10 Abb. N. C. 329. A husband left his wife, stating he was going into business in Cincinnati, but immediately sued in Utah for divorce, alleging that he intended to become a resident of that territory. No service was made upon the wife, other than by publication in Utah, and she had no knowledge of the proceedings. Held void. *People v. Smith*, 13 Hun, 414. It was held in *Kinnier v. Kinnier*, 45 N. Y. 535, that as regards the validity in this State of the decree of a court of competent jurisdiction in a sister State, the *status* of the parties within that State, and the question whether any of them were residents of that State so as to give them a standing in court there, for the purposes of such decree, are to be determined by that court, and their determination thereon cannot be questioned collaterally in our own. In *Hoffman v. Hoffman*, 46 N. Y. 30, it was held that a decree of divorce, obtained in another State, the defendant not being served with process, and both parties at the commencement of the suit and during its pendency being residents of this State, is

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invalid. The record of such decree is not conclusive as to jurisdiction, but the facts therein stated, giving the court jurisdiction, cannot be questioned. A judgment obtained in another State against one who, at the time it was rendered and during the pendency of the action was domiciled in this State, and who was not served with process and did not appear in the action, is inoperative and void as to the defendant. Recitals in the judgment are not conclusive and the jurisdiction of the court is open to question. *Cross v. Cross*, 108 N. Y. 628; *Burton v. Burton*, 45 Hun, 68. Otherwise when the party sued submits to the foreign jurisdiction by an appearance. *Jones v. Jones*, 108 N. Y. 415. In *Hunt v. Hunt*, 72 N. Y. 217, it was held that the jurisdiction of a court of another State in which a judgment has been rendered is always open to inquiry in the courts of this State, and the judgment may also be questioned collaterally for fraud. Where an action for divorce is brought in a court having power to entertain such an action, and which has jurisdiction of the parties, the court has power to give judgment, although plaintiff fails to make out a cause for divorce, as prescribed by the laws of the State, and this failure cannot be shown collaterally to avoid the judgment while it stands unreversed, whether the judgment is a valid one in the State where granted or in a sister State. The courts of this State will not attempt to pass primarily upon the validity of a divorce granted under the laws of another State. But in *People v. Baker*, 76 N. Y. 78, it was held that a court of another State cannot adjudge the dissolution of the marital relations of a citizen of this State, domiciled and actually residing here during the pendency of judicial proceedings in such State, without a voluntary appearance on his part therein and with no actual notice to him thereof, and this although the marriage was solemnized in such other State. Such a judgment is not a defence to an indictment against a citizen of this State for bigamy. An able and exhaustive discussion of these authorities and numerous others, including *Brinkley v. Brinkley*, 50 N. Y. 184; *Mann v. Mann*, 75 N. Y. 614; *Collins v. Collins*, 80 N. Y. 1, will be found in vol. 26, Alb. L. J. p. 446. Since that discussion, however, the Court of Appeals, in *O'Dea v. O'Dea*, 101 N. Y. 23, has held *per Curiam*: "We think the case of *People v. Baker*, 76 N. Y. 78, is conclusive on the question brought up by this appeal. * * * There are some differences in the detail of the circumstances of the two

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cases, but we think not enough to lead to any change in the result; nor sufficient to require a reconsideration of the law affecting it." In this opinion four of the judges concur, while three dissent, Danforth, J., writing an elaborate opinion. A judgment of divorce in another State, in which process was not personally served upon the defendant who resided here, *held*, void, and no defence to a subsequent action brought here for a divorce by the other party. *Beckwith v. Beckwith*, 24 Week. Dig. 5.

Where parties were domiciled in this State and there was no personal service of process on the wife or appearance by her, the record of a judgment in a foreign country will not be recognized. *De Meli v. De Meli*, 120 N. Y. 485. Same rule in *Williams v. Williams*, 17 Civ. Pro. R. 297. Husband and wife came from Ohio to New York and remained, the husband claiming his residence in Ohio; afterward he obtained a divorce for adultery by regular proceedings in an Ohio court, with nothing to show an effort to evade any law of New York; *held*, that the suit was brought in the court of the husband's residence and decree was valid. The divorce having been procured at the husband's instance, his administrators cannot question the jurisdiction. *In re Feyh's Estate*, 5 Supp. 90; S. C. 22 St. Rep. 542. To the same effect in *Matter of Morrison*, 52 Hun, 102; both cases cited distinguishing *O'Dea v. O'Dea*, 101 N. Y. 23, and *Cross v. Cross*, 108 N. Y. 628.

But a decree rendered by the court of another State in favor of the husband who commenced the action by publication of process, though valid in the State where rendered, is absolutely void as against the wife who always lived in and was a resident of this State, and was never personally served, and who did not appear in the action though she consented to the taking of depositions therein, and on the husband's death such wife is entitled to administration although the husband had re-married in another State and left a wife there surviving him. *In re House Estate*, 14 Supp. 275, 40 St. Rep. 286, 2 Connelly, 524, 20 Civ. Pro. R. 130. See, also, *Gray v. Gray*, 143 N. Y. 354, affirming 60 St. Rep. 225, 28 Supp. 856, as to residence of the parties married within this State as affecting the jurisdiction of the court.

A foreign decree of divorce against a resident of this State rendered in an action in which there was no personal service upon or appearance by him, is void in this State. *Matter of Strong*, 86 Hun, 390; S. C. under name *Matter of Degaramo*, 33

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Supp. 502, 67 St. Rep. 215. A foreign judgment of divorce rendered in the State of the plaintiff's residence against a resident in this State is valid and binding in this State where such defendant voluntarily appeared in the action. *Rich v. Rich*, 88 Hun, 566, 34 Supp. 854, 68 St. Rep. 823. A decree of a foreign State upon service by publication against defendant who had come into this State but under circumstances showing an intention at that time to make a permanent residence here, was held effectual in this State although the defendant subsequently continued to reside here. *Campbell v. Campbell*, 35 Supp. 280.

Where the husband procured a judgment of divorce in another State on the ground of abandonment, the wife not being served with summons nor appearing in the action, *held*, that the judgment though valid in the foreign State had no binding force in New York, and was no bar to an action brought by her here for a limited divorce in which the husband appeared. *Atherton v. Atherton*, 82 Hun, 179, 64 St. Rep. 798, 31 Supp. 977. Plaintiff in a divorce suit, not having been personally served with process in California as defendant in an action brought by her husband, is not estopped from denying the jurisdictional facts upon which the judgment rendered against her there was based. *Munson v. Munson*, 14 Supp. 692, 60 Hun, 189, 38 St. Rep. 7, 14 Supp. 692.

It seems that the courts of a foreign country may acquire jurisdiction of the person of a defendant in an action for divorce by means of substituted service of process where such defendant is domiciled within the jurisdiction of the court, but it is otherwise where the defendant is not so domiciled, and in such case the defendant cannot be charged *in personam* by adjudication there unless he is personally served with notice of process within it or voluntarily submits himself to the jurisdiction of its court by appearing in some manner in the action or proceeding sought to be instituted against him. *De Meli v. De Meli*, 120 N. Y. 485, 31 St. Rep. 704.

A judgment of another State which awards a divorce for alimony and costs, while valid as affecting the marital status of the plaintiff does not bind the defendant as to sums allowed for alimony and costs, in case the judgment be recovered in the State in which the wife is a resident citizen against her non-resident husband who has not appeared in the action nor has been served with process in the State in which the action was brought.

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A judgment for alimony and costs cannot be supported on the ground they are incidents of and subordinate to divorce and the jurisdiction to support a decree for divorce will not necessarily sustain a judgment for alimony and costs. *Rigney v. Rigney*, 127 N. Y. 408. On this point it is said by a recent text-writer that it is not necessary for a decree of divorce to contain special authority to allow the wife to resume her maiden name; she can use her own discretion in the matter. *Lloyd on Divorce*, 246. A divorced woman may assume her maiden name and sue thereunder after divorce. *Rich v. Mayer*, 7 Supp. 69.

SUB. 3. VACATING JUDGMENT.

The fraud or accident which will authorize interference with judgments must be unmingled with negligence on the part of the moving party. The proof must be clear and satisfactory to induce the court to interfere with a regular judgment alleged to have been fraudulently obtained; it is not sufficient merely to raise a suspicion or to show constructive fraud, but there must be proof of actual fraud; so held on application to vacate judgment for divorce on the ground of adultery. *Jones v. Jones*, 71 Hun, 519, 54 St. Rep. 885.

Where it clearly appears that a decree has been obtained by collusion, it is the duty of the court to set it aside. *McIntyre v. McIntyre*, 9 Misc. 252, 61 St. Rep. 75, 30 Supp. 200. Where judgment by default was taken against defendant against her motion to postpone, it was held on the facts that defendant was entitled to have the default opened notwithstanding plaintiff's remarriage, but that the decree should be allowed to stand for the protection of his second wife, and that cohabitation with her should not be treated as adulterous for the purposes of the action. *Scripture v. Scripture*, 70 Hun, 432, 54 St. Rep. 53, 24 Supp. 301.

A judgment for divorce may be set aside upon the ground that it was procured through fraud and imposition upon motion; an action is not necessary. *Megarge v. Megarge*, 2 Week. Dig. 352. But it will not be opened for irregularity where defendant has been guilty of laches which are not excused. The motion should be made within a year. *Schmidt v. Schmidt*, 1 Week. Dig. 124. And where plaintiff has married an innocent person the court, on opening the default, will allow the judgment to

 Art. 5. Remarriage, when Allowed.

stand until the final determination of the action. *Von Rhade v. Von Rhade*, 2 T. & C. 491. A collusive divorce, on the strength of which the plaintiff has married an innocent third person, defendant having, in pursuance of the collusive agreement, procured a judgment in another court, will not be set aside and the second marriage thereby invalidated without the most cogent proof of a right to defend. *Crocker v. Crocker*, 1 Buff. Super. Ct. 257. It is only where such relief is applied for, in the manner provided by statute, by one of the parties to the marriage, claimed to be unlawful on account of the existence of a former husband or wife of one of them, that the statute allows such marriage to be adjudged void. *Anonymous*, 2 T. & C. 558.

In *Redding v. Redding*, 39 St. Rep. 800, the court declined to set aside a decree upon conflicting evidence. Where the defendant's appearance and answer have been stricken out for contempt in disobeying an order for the payment of alimony, the court has no power to set aside the judgment and grant the defendant leave to answer upon the application of the third party with whom the adultery is alleged to have been committed. *Quigley v. Quigley*, 45 Hun, 23.

ARTICLE V.

REMARriage, WHEN ALLOWED. § 1761.

§ 1761. Marriage after divorce for adultery.

Where a marriage is dissolved, as prescribed in this article, the plaintiff may marry again, during the lifetime of the defendant; but a defendant, adjudged to be guilty of adultery, shall not marry again, until the death of the plaintiff. But this section does not prevent the remarriage of the parties to the action.

The following was passed in 1879 as chapter 321, Laws of that year, and was not repealed by Domestic Relations Law:

Chapter 321, Laws of 1879.

Section forty-nine of article three of title one of chapter eight of part two of the Revised Statutes, entitled "of divorces dissolving marriage contract," is hereby amended so as to read as follows:

§ 49. Whenever a marriage has been or shall be dissolved pursuant to the provisions of this article the complainant may marry again during the lifetime of the defendant, but no defendant convicted of adultery shall marry again until the death of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall only be made upon satisfactory proof that the complainant has remarried; that five years have elapsed since the decree of divorce was rendered; and that

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the conduct of the defendant since the dissolution of said marriage has been uniformly good.

The new Code did not repeal the act of 1879, chapter 321, § 49, allowing a party divorced on the ground of his own adultery from applying, under certain circumstances, for liberty to remarry. *Peck v. Peck*, 60 How. 206. See *Bracker v. Bracker*, 3 Law Bull. 52. Leave to remarry will not be refused merely because the man has continued to cohabit with the alleged paramour with whom he had been living under a void marriage. *Greene's Case*, 8 Abb. N. C. 450. A marriage contracted during the lifetime of a former husband or wife is not to be considered valid for any other purpose concerning property than that of preserving the inheritance of the offspring from the competent parent. *Spicer v. Spicer*, 16 Abb. (N. S.) 112. Where a marriage was sought to be affected by the date of a decree, it will be considered as having been entered at the opening of the court in the morning, as the law will not inquire into fractions of a day except in cases of necessity. *Merriam v. Walcott*, 61 How. 377. Second marriage by one against whom, for his adultery, a decree of divorce had been obtained, held void, though the ceremony was performed in another State, the parties going from this State for the purpose. *Marshall v. Marshall*, 2 Hun, 238; *Thorpe v. Thorpe*, 47 Super. Ct. 80. But these cases were overruled in *Van Vooris v. Brintnall*, 86 N. Y. 18, reversing 23 Hun, 260, and the rule laid down that the validity of a marriage contract must be determined by the law of the State where it was entered into, if valid there it is to be recognized as such in the courts of this State unless contrary to the prohibitions of natural law, or the express prohibition of a statute. The case of *Thorpe v. Thorpe*, 47 Super. Ct. 80, *supra*, was reversed in *Thorpe v. Thorpe*, 90 N. Y. 602, and *Van Vooris v. Brintnall*, 86 N. Y. 18, *supra*, followed, and it was held that a marriage, if valid under the laws of the State where it was contracted, is valid here, and every right and privilege growing out of the relation so established attaches to each party thereto. Both the latter cases are approved in *Moore v. Hegeman*, 92 N. Y. 521; and 86 N. Y. 18, *supra*, is followed in *People v. Chase*, 28 Hun, 310. See *Estate of Stack*, 10 St. Rep. 690. Leave should not be granted to marry again except on full disclosure and satisfactory proof. *Waas v. Waas*, 5 Law Bull. 59.

CHAPTER XVIII.

ACTION FOR SEPARATION.

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ARTICLE I.

FOR WHAT CAUSES AND IN WHAT CASES ACTION MAINTAINED. §§ 1762, 1763.

- SUB. 1. JURISDICTION. §§ 1762, 1763.**
2. CRUEL AND INHUMAN TREATMENT.
 3. ABANDONMENT AND FAILURE TO SUPPORT.
 4. CONDONATION.

SUB. 1. JURISDICTION. §§ 1762, 1763.

§ 1762. For what causes action may be maintained.

In either of the cases specified in the next section, an action may be maintained, by a husband or wife, against the other party to the marriage, to procure a judgment, separating the parties from bed and board, forever, or for a limited time, for either of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.
2. Such conduct, on the part of the defendant towards the plaintiff, as may render it unsafe and improper for the former to cohabit with the other.
3. The abandonment of the plaintiff by the defendant.
4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

§ 1763. Id.; in what cases.

Such an action may be maintained in either of the following cases:

1. Where both parties are residents of the State when the action is commenced,
2. Where the parties were married within the State, and the plaintiff is a resident thereof, when the action is commenced.

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3. Where the parties, having been married without the State, have become residents of the State, and have continued to be residents thereof at least one year; and the plaintiff is such a resident, when the action is commenced.

The court has no power to decree a divorce *a mensa et thoro*, except in the special cases provided for by statute, and the facts must be affirmatively established. If the bill be taken *pro confesso*, it will be referred to a master to report the facts. *Palmer v. Palmer*, 1 Paige, 276. The statute relating to limited divorces is, in the main, a re-enactment of the statute of 1843. It is, therefore, to be interpreted by that act. The court can only give judgment as authorized by the statute; its general jurisdiction cannot be invoked therein. *Davis v. Davis*, 75 N. Y. 221; *Atwater v. Atwater*, 53 Barb. 621. As to what is necessary to constitute residence in this State, for the purpose of maintaining an action, see *Brinkley v. Brinkley*, 50 N. Y. 184. Where the marriage took place without the State, an action for separation cannot be maintained, under § 1763, unless the parties have been residents of the State for at least one year and the plaintiff is such a resident at the time the action is commenced. *Ramsden v. Ramsden*, 28 Hun, 285, affirmed, 91 N. Y. 281.

The several subdivisions of § 1762 are alternative in their provisions, and the several causes prescribed by them for which a separation may be decreed are independent in their character. Where it appeared from the evidence that defendant made false charges of adultery against plaintiff and persistent efforts to entrap her into a confession of guilt, and that generally by his course of conduct she was kept in ill health and had attempted to commit suicide, a case was made out for separation under subd. 2, § 1762. *Fowler v. Fowler*, 33 St. Rep. 746, 19 Civ. Pro. R. 282.

The residence spoken of in § 1763 of the Code is an actual residence of the wife, which is presumed to follow that of the husband. It is the parties who must be residents of the State to entitle either of them to maintain an action for separation. *Hewes v. Hewes*, 40 St. Rep. 680. Where a wife left her husband who resided in Kentucky and went to reside in New York, which had been her residence previous to her marriage, and an action was commenced by the husband in Kentucky to procure a divorce on the ground of abandonment, in which the wife was not personally served with process, and did not appear in the suit so as to

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give the judgment binding force in New York, it was held the judgment was wholly inoperative in this State, and did not constitute a bar to her right to maintain an action for a separation against her husband in New York in case he appeared in an action brought thereafter in that State. *Atherton v. Atherton*, 82 Hun, 179.

Within the meaning of the Code, § 1763, prescribing when an action for separation between husband and wife may be maintained, the place of which the parties are residents is that of the permanent abode, and the word is used as synonymous with inhabitation or domicile and as distinguished from the place of their temporary residence. A court has no extra-territorial jurisdiction, and a person not domiciled in the State or country cannot be charged *in personam* by its adjudication unless he is personally served with notice or process within it or voluntarily submits himself to the jurisdiction of the court by appearing in some manner in the action or proceeding. *De Meli v. De Meli*, 120 N. Y. 485. Where parties married in Pennsylvania and resided there, and husband subsequently came to New York but wife refused to follow him; *held*, that the residence of the husband in New York did not confer jurisdiction in an action for separation on our courts. *Toosey v. Toosey*, 14 Daly, 537.

SUB. 2. CRUEL AND INHUMAN TREATMENT.

The cruelty which entitles the injured party to a decree of separation is that kind of conduct which endangers the life or health of the complainant and renders co-habitation unsafe. *Perry v. Perry*, 2 Paige, 501. As to what cruelty and violence are necessary in suit brought by husband, see *Perry v. Perry*, 2 Barb. Ch. 311. There must be ill-treatment and personal injury, or a reasonable apprehension of personal injury. Cruelty is where there is unkind treatment accompanied by words of menace creating a reasonable apprehension of bodily injury. *Whispell v. Whispell*, 4 Barb. 217; *Mason v. Mason*, 1 Edw. 278. There must be actual violence, or a reasonable apprehension of bodily injury. Wounded susceptibilities, occasional outbursts of passion, or gross abuse, are not enough. Menaces are enough, if they justify a belief in their seriousness so as to jeopardize health. *Davis v. Davis*, 1 Hun, 444. Mental suffering without bodily injury does not constitute cruel and inhuman treatment. *Paisley*

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v. *Paisley*, 2 Law Bull. 6. But actual personal violence is not necessary. *Bihin v. Bihin*, 17 Abb. 19; *Conklin v. Conklin*, 17 Abb. 20, n. A threat not giving rise to an apprehension of personal injury is not legal cruelty. The communication of a venereal disease will only constitute legal cruelty when knowingly or willfully communicated, and proof of such fact requires strong and conclusive evidence. *Wheeler v. Wheeler*, 17 Abb. N. C. 231.

Divorce may be granted where threats of violence such as to induce reasonable apprehension of bodily harm, and charges of infidelity in bad faith, in aggravation of threatened violence are made against a wife; but not where the charges are made in good faith on reasonable grounds, and the threats proceed from fits of passion, and are used to emphasize the charges, but without intent to inflict bodily injury. It is not cruelty for a husband, having reason to suspect his wife of infidelity, to charge her with it; but personal violence is not justifiable. *Kennedy v. Kennedy*, 73 N. Y. 369; *De Meli v. De Meli*, 5 Civ. Pro. R. 306. See s. c. below, 47 Super. Ct. 347. Where the alleged cruel treatment was the result of a discovery of the wife's adultery, a limited divorce will not be decreed. *Doe v. Doe*, 23 Hun, 19.

The evidence to sustain an action for separation on the ground of cruel and inhuman treatment is considered in *Worthingham v. Worthingham*, 7 Alb. L. J., 415. The social position of the parties may make a difference in the treatment due from the husband to the wife, in the way of providing for the mode of life, but not in the obligation of kindness. *Aumann v. Aumann*, 3 Law Bull. 17. A husband's refusal to permit a wife to attend a church of which she is a member is not ground for separation. *Lawrence v. Lawrence*, 3 Paige, 267. Occasional and even frequent intoxication is of itself not sufficient ground for separation, nor do occasional sallies of passion amount to legal cruelty, so long as they do not threaten bodily harm. *Mason v. Mason*, 1 Edw. 278; *Wheeler v. Wheeler*, 17 Abb. N. C. 231. The act of the husband in angrily expelling his wife from home, on the ground of her unfaithfulness, *held*, not sufficient ground for granting a limited divorce. *Barlow v. Barlow*, 2 Abb. (N. S.) 259. Compare *Davies v. Davies*, 55 Barb. 130. Demeanor calculated to provoke annoyance, discontent and disgust is alone not sufficient to authorize judgment of separation, especially where such conduct was practiced by both parties. *Conklin v. Conklin*, 17

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Abb. 20. n; *Klein v. Klein*, 42 How. 166. A single instance of cruelty is said not to be sufficient cause to authorize the court to interfere, although vague charges of ill-treatment are also made against the husband. *Solomon v. Solomon*, 28 How. 218. *Contra*, *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236. The word "unsafe," as used in the statute, has reference to bodily personal injury or violence, as distinguished from mental suffering or wounded sensibilities. *Walton v. Walton*, 32 Barb. 203. Refusal to allow wife to name child is not cruel treatment. *Appleby v. Appleby*, 2 McCarty, 422. It must be a strong case to authorize a limited divorce of husband from wife, as in such case the wife has no claim on the husband for support. *Palmer v. Palmer*, 1 Paige, 276. See *Perry v. Perry*, 1 Barb. Ch. 516. It is said in *Van Veghten v. Van Veghten*, 4 Johns. Ch. 501, that limited divorces are to be very cautiously granted. Dismissal of an action for a limited divorce on the ground of cruel and inhuman treatment was held proper on the evidence in *Burke v. Burke*, 75 Hun, 412, 56 St. Rep. 763, 27 Supp. 67; and in *Taylor v. Taylor*, 74 Hun, 639, 26 Supp. 246, the complaint was dismissed in an action on the ground of cruel and inhuman treatment, on the ground that the conduct complained of had been justified by plaintiff's conduct and that plaintiff had condoned a portion of the acts charged.

In *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236, will be found an elaborate opinion by Dwight, referee, which holds cruelty sufficient to obtain decree of separation to be a wrongful act or omission by one of the parties inconsistent with the discharge of the duties of married life, and defining it as either an act causing or threatening injury to life, limb or health, or words threatening indignity or inflicting pain, and that a single act of a sufficiently aggravated character may suffice. The report of the referee was confirmed. The same case also holds that privity of the wife with a conspiracy to induce the husband to commit adultery or to place him in equivocal relations with a woman not his wife, so as to bring an action for divorce upon the evidence thus obtained, constitutes cruelty sufficient to enable him to maintain his action for separation. Attention is called to foot-note 17 Abb. N. C. 237, *supra*, *Robbins v. Robbins*, holding that a husband is not guilty of connivance who leads his wife to believe he will be away from home at night and then surprises her in bed with another man.

But meanness, disagreeable conduct, or the use of vile lan-

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guage, affords no ground for a separation; the conduct of the husband must be such as to render it unsafe or improper for the wife to continue to live with him. *McBride v. McBride*, 31 St. Rep. 631; S. C. 9 Supp. 827. See S. C. 5 Supp. 388, on former appeal. However, cruel and inhuman treatment does not necessarily imply such treatment as places a wife in physical fear of her husband. Charges against the wife of unchaste conduct made by the husband against the wife in the presence of their children is such cruel and inhuman treatment as renders it improper for her to live with him and justifies the court in decreeing a separation. *Lutz v. Lutz*, 31 St. Rep. 718.

Where the husband laid violent hands on his wife, led her to the door, threatened to knock her down and struck at her twice, and on another occasion when she fell to the floor from sickness said "It is a pity you ever got up," and again "I will be glad when you draw your last breath," frequently called her opprobrious names and accused her of infidelity, naming various men with whom he charged her with having improper intercourse; *held*, the facts justified a finding of cruel and inhuman treatment. *Waltermire v. Waltermire*, 110 N. Y. 183. A husband is not bound to keep under his roof a wife no matter what her conduct may be, nor is he bound to leave his house or submit to her conduct. *Rose v. Rose*, 22 St. Rep. 526.

SUB. 3. ABANDONMENT AND FAILURE TO SUPPORT.

The term "abandonment" as used in the law of divorce, contemplates the voluntary separation of one party from the other without justification and with the intention of not returning. A decree of separation predicated upon abandonment should not be granted except upon very satisfactory proof of the fact. Where a husband asks for a decree of separation upon the ground of abandonment and it is refused, the court cannot pass upon or consider the question of the custody of the children. *Simon v. Simon*, 6 App. Div. 469. To constitute abandonment, the cessation of cohabitation must be without the consent of the other party, and with the intention not to resume it. An alternative tender by the wife, either of separation with support or of cohabitation with an independent provision, is not such an offer of reconciliation that its rejection will convict the husband of abandonment. *Dignan v. Dignan*, 17 Misc. 268.

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To justify a decree for divorce *a mensa et thoro*, there must be both an abandonment and a refusal or neglect to support the wife. *Ahrenfeldt v. Ahrenfeldt*, Hoff. Ch. 47. That the husband declines to reside with his wife in the same house with her father is no abandonment, if he offer her a support and a home, which she declines to accept. *Appleby v. Appleby*, 2 McCarty, 422. Where a wife, in pursuance of an agreement for separation, and for a consideration paid by the husband and accepted by her, has voluntarily left and lived apart from him, and neither offers to return nor to restore the consideration named, she cannot have a limited divorce on the ground of abandonment and refusal to support her. *Desborough v. Desborough*, 29 Hun, 592. In an action by a wife for a limited divorce, it appeared she left her husband without sufficient cause, yet she returned upon his promise to take her back and provide for her properly, and he failed so to do. *Held*, she was entitled to a decree in her favor. *Wandell v. Wandell*, Abb. Ann. Dig. 1884, page 111. To justify a limited divorce on the ground of abandonment, the evidence must show a settled and determined purpose in the husband to withdraw from the wife permanently his society and protection, and to withhold from her the means necessary for her support. *Ruckman v. Ruckman*, 58 How. 278. Abandonment and refusal or neglect to provide for the wife are both necessary as grounds for limited divorce. *Atwater v. Atwater*, 53 Barb. 621. To constitute an abandonment as a ground for judicial separation, there must be a final departure with the intention not to return, without sufficient reason therefor, and without the consent of the other party; the test is the intent at the time of departure, for if the desertion be complete a subsequent offer to return will not avail; the circumstances and manner of departure may be considered to show intent. *Uhlmann v. Uhlmann*, 17 Abb. N. C. 273.

Where a husband ceases living with his wife and expresses a fixed determination not to resume living with her, and there is absence of her consent to such separation, and of conduct on her part justifying the husband's withdrawal, there is an abandonment of the wife by the husband within the meaning of subd. 3. § 1762, notwithstanding the husband continues to provide for the wife's support, and she may maintain an action against him for separation from bed and board. A husband who refuses to live

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with his wife, although he supports her, is guilty of deserting her. *Clearman v. Clearman*, 15 Civ. Pro. R. 313.

The term desertion as used in the law of divorce contemplates a voluntary separation of one party from the other without justification, with the intention of not returning. Upon a wife's offer to return unconditionally, the husband was held upon the facts of the case to be without legal excuse, upon refusing to receive her. *Williams v. Williams*, 130 N. Y. 193, 41 St. Rep. 280. An unconditional offer by the wife to return to her husband's bed and board was refused by him, and both before and after that time he refused to contribute to her support, *held*, that the facts constituted both abandonment and neglect or refusal to support within § 1762, and justified a decree of separation. *Gilbert v. Gilbert*, 5 Misc. 555, 26 Supp. 30, distinguishing *Galusha v. Galusha*, 138 N. Y. 272.

Cruel and inhuman treatment does not necessarily imply such treatment as places a wife in physical fear of her husband. The conduct of the husband may produce such mental agony in the wife as to be even more cruel and inhuman than if mere physical pain had been inflicted, and where the conduct of the husband was of such a character it justified the court in freeing her from the necessity of submission to such treatment. Cruelty of a husband to his wife which has been condoned, will be revived by subsequent acts of cruelty which of themselves will not be sufficient to justify a separation; the condonation of the prior offense is always subject to the condition that the husband shall thereafter treat the wife with conjugal kindness. *Atherton v. Atherton*, 82 Hun, 179.

Where husband and wife are separated under an agreement by which he was to pay a specified sum per month for her support, and there was abundant evidence of cruelty on his part, it was held that when the husband refused to continue payments on pretext of a release by mistake for a receipt, the wife might maintain an action for a limited divorce without offering to return to her husband. *Schleifer v. Schleifer*, 47 St. Rep. 417, 19 Supp. 973. False and repeated accusations of unchastity addressed without reasonable cause by husband to his wife constitute cruel and inhuman treatment sufficient to justify a judgment of separation. Acts of cruelty committed by a husband toward his wife after condonation of prior acts revive the condoned offenses. *Straus v. Straus*, 67 Hun, 491, 50 St. Rep. 845.

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In *Fowler v. Fowler*, 11 Supp. 419, it is held that a false charge of adultery made by the husband to several persons, a statement that he had discovered the wife in the act and had a written statement from her paramour, the fact that he made persistent efforts to trap her into a confession of guilt and that the effect of this treatment was to twice bring plaintiff to a condition of nervous prostration when she attempted to take her own life, justified a decree for separation. Section 1758 has no application to an action brought for cruel and inhuman treatment. *Cox v. Cox*, 23 St. Rep. 691.

Proof of disagreement between husband and wife and of their living apart, apparently with the consent and approval of the wife, was held insufficient to justify a limited divorce on the ground of abandonment. *Adams v. Adams*, 49 St. Rep. 641, 20 Supp. 765. Where a husband agreed to live with his wife only on condition she would never again see her mother, it was held that it was an abandonment on the part of the husband, and his expressed willingness to live with his wife on the condition named was no answer to a suit for separation. *Williams v. Williams*, 17 Civ. Pro. R. 297; S. C. 6 Supp. 645, 25 St. Rep. 183.

SUB. 4. CONDONATION.

Former injuries are revived so as to entitle to separation for slighter misconduct than would constitute an original ground for separation. *Burr v. Burr*, 10 Paige, 20, affirmed, 7 Hill, 207; *Whispell v. Whispell*, 4 Barb. 217. An offer to return and cohabit made under an order of the court, or which is not accepted, or made upon conditions not accepted, is no condonation of husband's cruelty and abandonment. *Betz v. Betz*, 19 Abb. 90.

Evidence of cruelty which has been subsequently given, is admissible in an action for separation for subsequent cruelty as showing the character of the subsequent acts, and that they arose from a permanent mode of acting. Cohabitation is not of itself condonation of previous acts of cruelty. *Doc v. Doc*, 5 Supp. 514; S. C. 24 St. Rep. 364, 52 Hun, 405. It is also held in *Cox v. Cox*, 5 Supp. 367, that sexual intercourse is not a condonation of antecedent acts of cruelty, but only evidence on that issue. S. C. 23 St. Rep. 691.

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ARTICLE II.

PLEADINGS AND TRIAL. §§ 1764, 1765.

SUB. 1. COMPLAINT. § 1764.

2. ANSWER. § 1765.

3. TRIAL.

4. EVIDENCE.

SUB. 1. COMPLAINT. § 1764.

§ 1764. Requisites of complaint.

The complaint in such an action must specify particularly the nature and circumstances of the defendant's misconduct, and must set forth the time and place of each act complained of, with reasonable certainty.

Where a complaint demands judgment of separation from bed and board, forever without any demand for relief generally, or for any other relief, and where, on demurrer, the facts stated do not entitle the plaintiff to the judgment demanded, the complaint cannot be made more definite and certain. *Walton v. Walton*, 20 How. 347. Where the allegations in the complaint charged the defendant with scandalous, licentious and indecent conduct with other women than the plaintiff, it was held such allegations might be stricken out as immaterial. *Klein v. Klein*, 42 How. 166. It is proper to allege acts of misconduct and violence by the wife toward his children, visitors, and servants. *Perry v. Perry*, 1 Barb. Ch. 516. A cause of action for a limited divorce could not, before the Code of Civil Procedure, be joined with a cause of action for divorce *a vinculo*. *Johnson v. Johnson*, 6 Johns. Ch. 163; *McIntosh v. McIntosh*, 12 How. 289; *Henry v. Henry*, 17 Abb. 411. Acts of cruelty, committed after the commencement of the suit, may be set up by sufficient supplemental complaint. *Cornwall v. Cornwall*, 30 Hun, 573.

Complaint for Cruelty.

SUPREME COURT — ULSTER COUNTY.

ANNA P. BEREAN

agst.

RUDOLPH K. BEREAN.

The complaint of the plaintiff respectfully shows to this court:

First. That on the 15th day of October, 1872, at the town of Denning, in the county of Ulster, and State of New York, she was married to the defendant.

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Second. That both the plaintiff and defendant were at the commencement of this action, and still are, actual inhabitants of this State.

Third. That since the said marriage the defendant has treated the plaintiff in a cruel and inhuman manner, and his conduct has been such as to render it improper and unsafe for her to cohabit with him, and since the year 1872 he has repeatedly committed acts of cruelty and violence upon the plaintiff and her children, and in particular as follows, viz.:

1. In or about the month of November, 1872, at Treadwell's Hall, and at her place of residence, in said town of Denning, the defendant, without cause or provocation, falsely accused the plaintiff of soliciting the attention of men in an improper, lascivious, and unchaste manner.

2. In or about the month of March, 1873, when plaintiff met defendant on her return from a visit to relatives in the city of Albany, N. Y., the defendant, without cause or provocation, falsely accused the plaintiff of sleeping with different men while on said visit.

3. In or about the winter of 1874 and 1875, the defendant, without cause or provocation, falsely accused the plaintiff of carnal intimacy with Charles Wilson, who is a relative of plaintiff.

4. In or about the month of November, 1874, at the village of Walden, in the county of Orange, the defendant, without cause or provocation, ordered and compelled the plaintiff to leave his residence, so that the plaintiff had to take Julia Berean, the daughter of the parties hereto, then aged about one year, from the residence of the defendant to the residence of Mrs. Peter S. Brown, a widow, and the mother of the plaintiff, where the plaintiff was compelled to remain for about three weeks, when she was induced to return to the defendant's residence with her said child, upon promise of the defendant to treat her in a better and kindly manner.

5. On the 11th day of May, 1879, at Denning, aforesaid, the defendant, without cause or provocation, violently assaulted the plaintiff, and threatened to kill her.

6. In the summer of 1884, at Denning, aforesaid, the defendant, without cause or provocation, profanely cursed and swore at the plaintiff, and he used vulgar and obscene language to the plaintiff.

7. In the summer of 1886, at Denning, aforesaid, the defendant, without cause or provocation, assaulted the plaintiff and called the plaintiff a ———, and at another time in the same summer, and at the same place, the defendant called the plaintiff a ———.

8. In the summer of 1886, at Denning, aforesaid, the defendant, without cause or provocation, threatened the plaintiff that the defendant would kill the plaintiff, even if he knew that he would be hanged for it.

9. On the 29th day of October, 1887, at Denning, aforesaid, the defendant, without cause or provocation, asked a young woman, employed to do housework at the residence of the defendant, if she thought that the plaintiff would put poison in the food of the defendant.

10. That the defendant, without cause or provocation, has ordered

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and directed the plaintiff to leave his house many times, in each and every year, for the past ten years, and that he has, on divers occasions, within the time aforesaid, at Walden aforesaid, without cause or provocation, forbidden the plaintiff to enter his store at Walden, N. Y., and the defendant has threatened to break the plaintiff's neck if she entered his store, and he informed the plaintiff, at Walden aforesaid, in the month of July, 1887, that he had directed an employe in said store to remove the plaintiff therefrom by force if she entered said store; that the defendant has at Walden aforesaid, and within the times aforesaid, repeatedly cursed and swore at the plaintiff, and has repeatedly informed the plaintiff that he "hated the sight" of her, and that he and the plaintiff could never continue to live together; that his entire course of conduct toward the plaintiff, with rare intervals, has been for a long period uniformly brutal, abusive, profane and obscene, he being constantly applying abusive epithets to her, of threatening her with violence and of striking and attempting to strike her, and it has become entirely unsafe for her to live with him.

Fourth. That since the marriage of the parties hereto the plaintiff has given birth to the following children, who are now living with the plaintiff, and who are the issue of said marriage, viz.: Julia Berean, a daughter, aged thirteen years; Clarence Berean, a son, aged eleven years; and Benjamin H. Berean, a son, aged ten years; and the plaintiff alleges that the defendant is an unfit and improper person to have the care, custody, training and education of said children; that, as the plaintiff is informed and believes, the defendant owns real estate at Denning aforesaid, of the value of \$15,000, and personal estate at said place of the value of \$20,000. Wherefore the plaintiff demands judgment for a separation from the bed and board of the defendant, and that the custody of said children be awarded to the plaintiff, and that a reasonable provision for the support of the plaintiff and her children be made out of the property of the defendant, and for costs of this action.

Precedent for Complaint Praying for Custody of Child, etc.

SUPREME COURT.

MAY WILLIAMS

agst.

CORNELIUS WILLIAMS.

130 N. Y. 193.

City and County of New York, ss.:

The plaintiff complaining of the defendant avers:

1. That on or about the 3d day of June, 1879, the plaintiff and defendant were married at the city of New York.
2. That the plaintiff is an inhabitant of the city and county of

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New York and that the defendant resides at St. Paul, in the State of Minnesota, but is at present sojourning in the State of New York.

3. That in or about the month of August, 1882, the defendant abandoned the plaintiff and refused to permit her to return to him, and still does so refuse.

4. That but one child was born to the plaintiff and defendant.

5. That said child is a boy and was born on the 5th day of April, 1880, and has always resided with the plaintiff herein and does still so reside.

6. That after the date of the abandonment aforesaid, August, 1882, and to and including the month of February, 1885, the defendant contributed toward the maintenance of the child of the parties hereto, but since said date has contributed nothing toward the support of the said child.

7. That since the date of the abandonment aforesaid, August, 1882, the defendant has utterly neglected and refused to provide for the plaintiff.

Wherefore the plaintiff prays for a judgment separating the parties hereto from bed and board forever, and that the defendant may be compelled to provide suitably for the education and maintenance of the child of the marriage aforesaid, and for the support of the plaintiff, and that the custody of the child aforesaid may be awarded to the plaintiff, and for such other and further relief as the plaintiff may be entitled to in the premises, together with the costs of this action.

ELLIOTT & S. SIDNEY SMITH,
Plaintiff's Attorneys.

Precedent for Complaint for Abandonment.

SUPREME COURT — DUTCHESS COUNTY.

EDWARD N. WALTERMIRE

agst.

MARIA WALTERMIRE.

110 N. Y. 183.

The complaint of the above-named plaintiff respectfully shows to this court:

I. That said plaintiff was married to said defendant on the 20th day of July, 1834, and that said plaintiff and defendant were on said date, and still are, residents of this State.

II. That the issue of said marriage of the plaintiff and defendant are two sons, who are of full age.

III. That although the said plaintiff has always conducted himself towards the said defendant as a faithful and loving husband, the said defendant disregarded her duties as a wife, and on the 20th day of September, 1882, at which time said plaintiff was seventy years old and in feeble condition of health and entirely alone and without just cause or provocation, left and has been ever since willfully

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absent from said plaintiff's bed and board although said plaintiff has repeatedly requested said defendant to return.

Wherefore the said plaintiff asks the judgment of this court that a decree of separation may be made by this court ordering, directing and decreeing that said plaintiff and defendant live separate and apart forever, besides the costs of this action.

HENRY W. GILBERT,
Plaintiff's Attorney.

SUB. 2. ANSWER. § 1765.

§ 1765. Defendant may set up plaintiff's misconduct.

The defendant may set up, in justification, the misconduct of the plaintiff; and if that defence is established to the satisfaction of the court, the defendant is entitled to judgment.

In a suit for divorce *a mensa et thoro*, an answer averring that at the time of the marriage "the plaintiff was a married woman, the wife of one A., then living, from whom she had never been divorced, which facts were unknown to the defendant," is sufficient; it need not negative the exceptions in the statute. *Clark v. Clark*, 5 Hun, 340. Recrimination or condonement must be set up by defendant in his answer. *Roe v. Roe*, 14 Hun, 612. Plaintiff's misconduct, sufficient to entitle defendant to relief, is a complete defense. *Palmer v. Palmer*, 1 Sheld. 89. As is plaintiff's adultery. *Doc v. Roe*, 23 Hun, 19.

The defendant may deny the misconduct charged, and set forth misconduct on the part of the plaintiff. *Hopper v. Hopper*, 11 Paige, 46. It was formally held that adultery could not be set up as a defence to an action for cruelty. *Henry v. Henry*, 17 Abb. 411; *McIntosh v. McIntosh*, 12 How. 289. But the rule is otherwise under § 1770, as amended in 1881, which see, and cases cited, as to counterclaim and affirmative defences. See, also, *Crow v. Crow*, 7 Civ. Pro. Rep. 423; *Doc v. Doc*, 23 Hun, 19. It seems voluntary cohabitation will bar a suit for a limited divorce on the ground of cruelty. *Davies v. Davies*, 55 Barb. 130. But there is no statutory provision as to delay in bringing suit for separation though a long delay might, in peculiar cases, lead to its dismissal. *Burr v. Burr*, 20 Paige, 20, affirmed, 7 Hill, 207.

SUB. 3. TRIAL.

The proceedings upon default, as well as in case of trial of issues or references, are substantially the same as heretofore given

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in actions for divorce *a vinculo*, to which reference is had for the method of procedure.

Where the issues are sent to a referee to hear and determine, judgment on the report, dismissing the complaint, cannot be entered without application to the court. *Lewellyn v. Lewellyn*, 1 Law Bull. 35. A final decree of divorce, *a mensa et thoro*, is not made except the facts appear before the court on actual proof, otherwise a divorce might be procured by collusion; it will not be made merely upon taking the bill as confessed. *Barry v. Barry*, Hopk. 118; *Palmer v. Palmer*, 1 Paige, 276. In an action where the plaintiff fails to prove the cruelty alleged, and the referee finds, under the pleadings, that a former husband of the plaintiff was living at the time of her marriage with defendant, this is not sufficient ground to declare the last marriage void. *Linden v. Linden*, 36 Barb. 61. A decree of limited divorce may be made where the wife fails to establish her complaint, and the husband proves cruel and inhuman treatment on her part. *McNamara v. McNamara*, 9 Abb. 18.

SUB. 4. EVIDENCE.

In an action for a limited divorce evidence that plaintiff's mother made communications to defendant as to the conduct of plaintiff with other men, which he communicated to her, is competent as showing great provocation for the use of violent language, and to disprove a charge that defendant separated plaintiff from her mother. *Woodrick v. Woodrick*, 141 N. Y. 457, 36 N. E. Rep. 395, 57 St. Rep. 634; *Kennedy v. Kennedy*, 73 N. Y. 369.

In *Murray v. Murray*, 41 St. Rep. 428, 16 Supp. 363, it was held that the use of vile and indecent language by a husband to his wife, making serious accusations of marital misconduct, threatening personal injury, would authorize a decree of separation, but that the proof of facts was insufficient. It seems that in a wife's action for separation for cruel and inhuman treatment she may show abuse of their daughter by the defendant in plaintiff's presence and against her protest. *Taylor v. Taylor*, 74 Hun, 638, 26 Supp. 246.

Defendant's declaration to plaintiff, then his young bride, on the second night after the marriage, that he did not love her, that he made a mistake in marrying her, considered as an act of cruelty and the beginning of a course of treatment, destined to destroy

Art. 2. Pleadings and Trial.

the happiness and to undermine her health, *held*, not a privileged communication, but admissible when testified to by the plaintiff, not as a declaration of the fact declared, but as a fact in itself contributing to constitute plaintiff's cause of action for a limited divorce, for the conduct of the defendant, rendering it unsafe and improper for her to live with him. *Fowler v. Fowler*, 33 St. Rep. 746, 19 Civ. Pro. R. 282, 11 Supp. 419.

Pending an action for a separation, the court declared defendant an habitual drunkard and appointed a committee who was allowed to come in and assist defendant in his defence; *held*, that this was no reason why the action for separation should be stayed. *Gregg v. Gregg*, 48 Hun, 451; S. C. 17 St. Rep. 966. Evidence in an action for separation because of an assault by the son, claimed to have been incited by the husband, upon plaintiff, was held insufficient to justify a decree in *McCahill v. McCahill*, 71 Hun. 221, 54 St. Rep. 759. In an action for limited divorce on the ground of cruelty, where the trial judge found for plaintiff, it was held that the evidence being conflicting, the judgment should stand, Van Brunt, P. J., dissenting. *Bucki v. Bucki*, 85 Hun, 619, 66 St. Rep. 432, 32 Supp. 1028. In *O'Keeffe v. O'Keeffe*, 34 St. Rep. 493, 11 Supp. 628, a finding for defendant in a suit for separation on the ground of cruel and inhuman treatment was sustained on consideration by the court of conflicting evidence. Where the testimony of plaintiff in an action for separation established cruel and inhuman treatment, the fact that her evidence was denied on all material points by defendant, is not sufficient to impeach the findings of the trial court. *Bolen v. Bolen*, 6 Supp. 164. Where there has been a forgiveness of previous acts of cruelty, sufficient to bar an action, proof of such previous cruelty is competent on the trial of an action for separation for the purpose of giving character to subsequent acts and showing that they arose from a settled purpose and not from impulse. *Doc v. Doc*, 52 Hun, 405. Where a husband, in the presence of his children, charges his wife with unchastity, there being no evidence to sustain the charge, the court may properly decree a limited divorce, as cruel and inhuman treatment does not necessarily imply such treatment as places a wife in physical fear of her husband. *Lutz v. Lutz*, 31 St. Rep. 718, 9 Supp. 858.

The malicious making and circulating of false charges against the wife is the proper subject of complaint and proof as auxiliary to

 Art. 3. Judgment, what to Contain and when Revoked.

others matters alleged by her in support of an action for separation founded upon cruel and inhuman treatment; although such accusation was made by the defendant after plaintiff left him, if made without any reasonable cause, might furnish some evidence bearing upon his feeling toward the plaintiff and characterize his treatment of her while she remained with him. *De Meli v. Meli*, 120 N. Y. 485, 31 St. Rep. 704, affirming 11 St. Rep. 291.

ARTICLE III.

JUDGMENT, WHAT TO CONTAIN AND WHEN REVOKED.

§§ 1766, 1767.

§ 1766. Support, maintenance, etc., of wife and children.

Where the action is brought by the wife, the court may, in the final judgment of separation, give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff as justice requires, having regard to the circumstances of the respective parties. And the court may, in such an action, render a judgment, compelling the defendant to make the provision specified in this section, where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

§ 1767. Judgment for separation may be revoked.

Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation, a judgment for a separation, forever, or for a limited period, rendered as prescribed in this article, may be revoked, at any time, by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

Judgment may be for temporary separation, where defendant is very young and he may possibly reform. *Bedell v. Bedell*, 1 Johns. Ch. 604. Or a perpetual separation may be decreed, with power to the parties to come together, under the sanction of the court, whenever they should find it to be their mutual and voluntary disposition. The considerations which should govern such cases discussed, *Barrere v. Barrere*, 4 Johns. Ch. 187. The court may make an order for support and maintenance of wife and children whether separation is granted or not. *Atwater v. Atwater*, 36 How. 431. But a decree for maintenance cannot be made on the ground the husband is of intemperate habits. *Douglass v. Douglass*, 5 Hun, 140. Where a separation is granted at the husband's suit, there is no power to order him to support his wife. *Perry v. Perry*, 2 Barb. Ch. 311; *Palmer v. Palmer*, 1 Paige, 276.

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The licentious conduct of the wife, before the alleged acts of cruel treatment, will bar her claim for maintenance. *Bedell v. Bedell*, 1 Johns. Ch. 604. After a decree *a mensa et thoro*, the courts will protect the wife in the enjoyment of the fruits of her industry. *Meehan v. Meehan*, 2 Barb. 377; *Holmes v. Holmes*, 4 Barb. 295. A wife who voluntarily separates from her husband, not charging him with adultery or cruelty, cannot have a support from his property, though it was derived from her. *Noe v. Noe*, 13 Hun, 436. Where a decree for divorce directs an allowance for maintenance of children, until the further order of the court, an application to pay the allowance should be made by motion or petition, not by new bill. *Paff v. Paff*, Hopk. 584. Where a decree *a mensa et thoro* has been entered in favor of a wife, without provision for her maintenance, she cannot have the decree changed so as to make such provision, by showing that the husband's pecuniary circumstances are such as to make an allowance proper. *Erkenbrack v. Erkenbrack*, 63 How. 194.

This decision was modified on appeal — 5 Civ. Pro. R. 184 — and it was held that direction for payment for alimony by the husband to the wife cannot be made after decree of separation making no provision therefor; but provision for the support of the children may be so made, and so modified was affirmed, 96 N. Y. 456; and in *Washburn v. Catlin*, 97 N. Y. 623, the same rule is reiterated on the authority of 96 N. Y. 456, *supra*. In *P. v. P.* 24 How. 197, maintenance of the wife was ordered in her husband's house and a sum allowed her, though divorce for cruelty was denied on ground of condonation. The circumstances under which a decree for maintenance may be made must be such as would, of themselves, justify a decree for a separation; but under such circumstances a decree for separate maintenance may be had even though a decree of separation may not be. A decree for maintenance, which directs that the amount allowed for support should be ascertained by reference, should be reviewed at General Term by motion for new trial and not by appeal. *Douglas v. Douglas*, 5 Hun, 140. In an action for limited divorce the court, after it has denied the principal relief asked, on the ground that the evidence failed to establish the cause of action, has no power to give judgment awarding the custody of the children of the marriage to the plaintiff and making provision for their maintenance out of the property of the husband. Upon failure of the plaintiff to make

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out a case for divorce, the defendant is entitled to judgment dismissing the complaint. The provision authorizing maintenance only applies where cause for divorce is made to appear to the court. It seems that where husband and wife live apart, the remedy of the wife seeking the custody of the children is by *habeas corpus*. *Davis v. Davis*, 75 N. Y. 221. Where, in an action by a husband against his wife for a separation, the husband has judgment, the court had no power to order an allowance for the support of the wife. *Waring v. Waring*, 100 N. Y. 570.

An action by a wife against her husband for maintenance and support simply is not maintainable under the Code of Civil Procedure. Section 1766, authorizing provision for maintenance and support, applies only where the action is for separation. Where, therefore, the complaint in an action by a wife against her husband alleged facts sufficient to sustain an action for separation, but simply asked for support and maintenance, *held*, the court had no jurisdiction to make an order granting alimony or counsel fees. *Ramsden v. Ramsden*, 91 N. Y. 281, affirming 28 Hun, 285. A decree for maintenance is only an incident to one for separation. *Ruckman v. Ruckman*, 58 How. 278; *Bloodgood v. Bloodgood*, Abb. Annual, 1884, page 111. The providing for maintenance, when separation is not ordered, is not to be done by appointing a receiver of any portion of the husband's property in the first instance, but by requiring security for the payment of the allowance, and sequestrating property only in case of refusal to give security, or on default afterward. *Davis v. Davis*, 1 Hun, 444. See § 1772, as to the proper course of procedure under present Code. All the cases relating to granting alimony *pendente lite*, and after a judgment in divorces *a vinculo*, as well as *a mensa et thoro*, are collated under § 1769, for greater convenience and to avoid repetition.

In an action for a limited divorce, the defendant after answer served an offer to allow judgment to be taken against him for a separation and for a specified amount of alimony, the offer was accepted and judgment entered thereon without application to or direction by the court, but was afterward vacated; *held*, that such judgment was in effect one by consent and absolutely void; that a motion for a decree that the amount of alimony paid by defendant under said judgment should be regarded as in full of all alimony chargeable to the defendant should not be granted.

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Dailey v. Dailey, 9 Misc. 511. It was held in *Daggett v. Daggett*, 5 Paige, 509, that previous to a decree dissolving a marriage, the wife could not make a valid agreement as to her allowance for alimony and that same reasoning applies to an action for a separation. *Blott v. Rider*, 47 How. 90; *Sullivan v. Sullivan*, 41 Supr. 519; *Peugnet v. Phelps*, 48 Barb. 566; *Burr v. Burr*, 7 Hill, 207, are also referred to in *Dailey v. Dailey*, 9 Misc. 514, 30 Supp. 337.

A judgment separating the parties as husband and wife upon the ground of cruel and inhuman treatment by the former, directed that he pay the plaintiff a sum equal to one-third of the entire property of the defendant; it was held that such a judgment was not contemplated by § 1766. *Sleeper v. Sleeper*, 48 St. Rep. 41, 65 Hun, 454, affirm without opinion, 142 N. Y. 625.

An allowance to the wife for counsel fees or expenses of the action cannot be awarded in a final judgment of divorce or separation under §§ 1766 and 1769, and § 1769 does not empower the court to award by either final judgment or order before a judgment an allowance to the wife for past expenses in an action for divorce or separation. *Straus v. Straus*, 67 Hun, 491, 50 St. Rep. 845.

A decree of separation is not vacated or in any manner revoked by the reconciliation or cohabitation of the parties. This can only be done by an order of the court as contemplated by § 1767. *Hobby v. Hobby*, 5 App. Div. 496. Subsequent cohabitation and reconciliation of the parties does not revoke a decree of separation; such decree can only be revoked by order of the court. *Jones v. Jones*, 90 Hun, 414, 35 Supp. 877, 70 St. Rep. 319.

Form of Judgment for Separation with Maintenance, and Providing for Custody of Children.

SUPREME COURT.

ANNA P. BEREAN <i>agst.</i> RUDOLPH K. BEREAN.
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The issues in this action having been brought on for trial at a Circuit Court, held before Mr. Justice Parker, without a jury, at the court-house, in the city of Kingston, Ulster county, N. Y., on the 23d day of April, 1888, and continuing from time to time thereafter

Art. 3. Judgment, what to Contain and when Revoked.

until the adjournment of the court, and a decision therein having been rendered for the plaintiff and filed: Now, on motion of Carroll Whitaker, plaintiff's attorney, it is ordered, adjudged and decreed that the said plaintiff and defendant be separated from bed and board forever.

And it is further ordered, adjudged and decreed that the care, custody and control of Julia M. Berean, the daughter of the parties hereto, is hereby awarded to said Anna P. Berean, with leave to the defendant to visit said Julia from time to time at reasonable hours in the day-time only, and not more frequently than once in each week, and each visit shall not exceed more than two hours. This provision may be changed at any time by consent of the plaintiff, or by an order of this court, so that more frequent and longer visits may be made by defendant to said daughter Julia, in case of sickness, or as circumstances may require.

And it is further ordered, adjudged and decreed that said Rudolph K. Berean may have the care, custody and control of said daughter Julia whenever he may request the same of the plaintiff, in writing, for one week, between the first days of January and July in each year and for one week between the first days of July and January in each year.

And it is further ordered, adjudged and decreed that the care, custody and control of Clarence Berean and Benjamin Berean, sons of the parties hereto, is hereby awarded to the defendant Rudolph K. Berean, with leave to the plaintiff to visit each of them from time to time at reasonable hours in the day-time only, but not more frequently than once in each week, and each visit shall not exceed more than two hours in duration. This provision may be changed at any time by consent of the defendant, or by order of this court, so that more frequent and longer visits may be made by the plaintiff to each of said sons, in case of sickness, and as circumstances may require.

It is further ordered, adjudged and decreed that said Anna P. Berean may have the care and custody of said sons whenever she may request the same of the defendant, in writing, for one week between the first days of January and July in each year, and for one week between the first days of July and January in each year.

It is further ordered, adjudged and decreed that the defendant Rudolph K. Berean pay to the plaintiff \$10 per week during their joint lives from the date of this decree for her support and maintenance; such payments to be made quarterly, viz.: on the 15th days of July, October, January and April in each year; and if said days fall upon Sunday or holidays, then payment to be made on the next day. The first quarter-yearly payment to be made July 15, 1888, and such payments to be made by deposit to the credit of the plaintiff in the First National Bank of Saugerties on the days above mentioned.

It is further ordered, adjudged and decreed that the defendant Rudolph K. Berean pay to the plaintiff \$8 per week for the support, education and maintenance of the said daughter Julia M. Berean, from the date of this decree during the minority of the said Julia.

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The said last payments to be made quarterly, on the same days above stated, and the said moneys to be deposited in the bank above stated and, as in case of payments to the plaintiff, for her individual support.

And it is further ordered, adjudged and decreed that the plaintiff, at any time whenever she may deem it proper and necessary, may apply to this court to require the defendant to give security, in such manner and within such time as the court thinks proper, for the payment from time to time of the sums of money required by this judgment to be paid by the defendant to the plaintiff, and the court, in its discretion, upon such application, may require such security to be given.

And it is further ordered, adjudged and decreed that the court at any time hereafter, upon application of either or both of the parties hereto, may change, alter or modify any of the provisions of this decree, including those as to the custody and control of the infants, and to increase or diminish the amount to be paid to the plaintiff for her support and maintenance, or for the support, education and maintenance of said Julia, and when the said maintenance shall terminate.

It is further ordered, adjudged and decreed that the sum of \$300 be paid to the plaintiff's attorney for costs, disbursements and extra allowance for the prosecution of this action, which, together with \$200 heretofore paid under the orders of this court for like purpose, is the amount of costs and disbursements allowed in this action; the said \$300 to be paid within ten days from the date of this decree. This provision, however, is not to prevent the plaintiff, in case the defendant appeals from the judgment, to apply to the court for a further allowance to defend this action, upon such appeal.

SAMUEL EDWARDS,
Justice Supreme Court.

Precedent for Judgment.

At a Special Term of the Supreme Court held at the county court house in the city of New York, on the 2d day of July, 1888.

Present — Hon. Miles Beach, *Justice*.

MAY WILLIAMS

agst.

CORNELIUS WILLIAMS.

130 N. Y. 193.

The summons, with a copy of the complaint in this action, having been personally served upon the defendant and the defendant having appeared herein by MacFarland, Boardman & Platt, Esqs., his attorneys, and having served an answer to the complaint, and having afterwards in pursuance of leave granted at the trial, amended his answer, and issue having been duly joined thereupon, and

Art. 3. Judgment, what to Contain and when Revoked.

This action having come on to be tried in its order on the calendar at a Special Term of the Supreme Court of the State of New York, held at the court house in the city and county of New York, on the first Monday of April, 1888, before the Hon. Miles Beach, one of the judges of the Court of Common Pleas for the city and county of New York, duly assigned to hold said court, without a jury, and the said action having been tried on the 24th and 25th of said April, and the decision of the said judge having been duly made and filed, and it appearing to the court that before the commencement of this action the defendant abandoned the plaintiff,

Now, on motion of Elliott & S. Sidney Smith, of counsel for the plaintiff, it is ordered, adjudged and decreed, and this court by virtue of its power and authority and of the statute in such case made and provided, doth order, adjudge and decree:

1. That the said plaintiff and defendant be and they are hereby separated from bed and board forever.

2. That the care, custody and education of the child of such marriage is hereby awarded to the plaintiff, subject to the right to the defendant to see said child, with the right to the defendant to apply to this court at any time for its order and direction as to the maintenance and education of said child.

3. That the defendant pay to the plaintiff as an allowance for the education and maintenance of the said child, in monthly installments from the date of this judgment, the sum of \$500 annually or until the further order of this court.

4. That the defendant pay to the plaintiff for the support and maintenance of the plaintiff, in monthly installments from the date of this judgment, the sum of \$1,000 annually.

5. That if any event shall occur materially changing the circumstances of the parties or either of them, an application may be made on the foot of this judgment in this action by any party in interest, for such modification of such judgment as may be just.

6. That the defendant pay to the plaintiff or to her attorneys, Elliott & S. Sidney Smith, her costs and disbursements of this action, as taxed and adjusted by the clerk, viz: Ninety-nine $\frac{87}{100}$ dollars, and that the plaintiff have execution therefor.

7. That the defendant pay to the plaintiff or her attorneys, Elliott & S. Sidney Smith, in addition to the said costs and disbursements, a counsel fee in this action of \$250.

JAMES A. FLACK,
Clerk.

CHAPTER XIX.

PROVISIONS APPLICABLE TO NULLITY, DIVORCE AND SEPARATION.

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ARTICLE I.

RESIDENCE OF MARRIED WOMAN AND JURISDICTION OF COURT. § 1768.

§ 1768. Married woman deemed a resident in certain cases.

If a married woman dwells within the State, where she commences an action against her husband, as prescribed in either of the last two articles, she is deemed a resident thereof, although her husband resides elsewhere.

A denial in the answer of the allegation in the complaint, that the plaintiff was a resident of the State, does not take from the court the power to make allowances. It is an issue in the cause. *Brinkley v. Brinkley*, 50 N. Y. 184. The domicile of the husband is *prima facie* that of the wife; but she may acquire a separate domicile wherever it is necessary for her to do so, as where the parties are living apart under a judicial decree of separation, or

Art. 2. Indorsement of Process and Proof of Service.

where the conduct of the husband has been such as to entitle her to a divorce, absolute or limited. *Hunt v. Hunt*, 72 N. Y. 217. Although, *prima facie*, the domicile of the wife is the same as that of the husband, the law recognizes an exception to the rule where the husband begins an action to dissolve the marriage contract. In such case the theoretical identity of person and interest ceases to exist, and the jurisdiction of the court depends upon the actual existing facts. *Mellen v. Mellen*, 10 Abb. N. C. 333, and cases cited; also elaborate note on domicile for purposes of divorce, citing cases in this and other States. The rule is now well established that a wife may acquire a domicile separate from that of her husband, whenever it is necessary for her to do so; and when they have agreed to live apart the wife's domicile cannot be drawn to that of her husband without her consent. *Round v. Van Inwegen*, 9 Civ. Pro. R. 328. A married woman may have a domicile in a jurisdiction other than that of her husband when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce. She may acquire a separate domicile whenever it is necessary for her to do so, but the right to do so springs from the necessity of its exercise. *Atherton v. Atherton*, 82 Hun, 179.

ARTICLE II.

INDORSEMENT OF PROCESS AND PROOF OF SERVICE.

§ 1774. Rule 18.

§ 1774. Regulations respecting judgment by default.

In an action brought as prescribed in this title, a final judgment shall not be rendered in favor of the plaintiff, upon the defendant's default in appearing or pleading, unless the summons and a copy of the complaint were personally served upon the defendant; or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the State, or published pursuant to an order for that purpose, obtained as prescribed in chapter fifth of this act, contains the following words, or words to the same effect, legibly written or printed upon the face thereof, to wit: "Action to annul a marriage;" "Action for a divorce;" or "Action for a separation;" according to the article of this title, under which the action is brought. Where the summons is personally served, but a copy of the complaint is not served therewith; or where a copy of the summons and a copy of the complaint are delivered to the defendant without the State, the certificate or affidavit proving service, must affirmatively state, in the body thereof, that such an inscription, setting forth a copy thereof, was so written or printed upon the face of the copy of the summons delivered to the defendant.

Art. 2. Indorsement of Process and Proof of Service.

Rule 18. Service of summons by person other than sheriff; affidavit of, what to contain in divorce cases.

Where personal service of the summons and of the complaint or notice, if any accompany the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service, his age, or that he is more than twenty-one years of age; when, and at what particular place, and in what manner he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein; and also to state in his affidavit that he left with defendant such copy, as well as delivered it to him. No such service shall be made by any person who is less than eighteen years of age.

In actions for divorce, or to annul a marriage, or for separate maintenance, the affidavit, in addition to the above requirements, shall state what knowledge the affiant had of the person served, being the defendant and proper person to be served, and how he acquired such knowledge. The court may require the affiant to appear in court and be examined in respect thereto; and when service has been made by the sheriff, the court must require the officer who made the service to appear and be examined in like manner, unless there shall be presented with the certificate of service the affidavit of such officer, that he knew the person served to be the same person named as defendant in the summons, and shall also state the source of his knowledge.

The omission to indorse on the summons, in an action for divorce served without the complaint, what the action is brought for, does not render the summons a nullity, but may be cured by amendment. *Scars v. Scars*, 9 Civ. Pro. R. 432. Where a decree was fraudulently obtained on default, it was held a nullity. *People, ex rel. Commissioners, v. Smith*, 13 Hun, 414, citing *Kerr v. Kerr*, 41 N. Y. 472; *Hoffman v. Hoffman*, 46 N. Y. 30; *Kamp v. Kamp*, 59 N. Y. 212.

The intention of the Legislature in providing that the summons in an action should have upon the face thereof the words "action to annul a marriage," "action for a divorce" or "action for a separation," where the action is brought for any one of these three causes and a copy of the complaint is not served with the summons, was to prevent fraud and imposition upon parties and by parties upon the court; whenever this purpose is accomplished and the court can see in a given case that what was designed has been done, it should, if possible, give effect to the action even though the form be transgressed, if the substance remain intact. Where in an action for separation the summons is indorsed by the words "action for divorce," the words were equivalent to the words "action for a separation." *Rudolph v. Rudolph*, 19 Civ. Pro. R. 424, 34 St. Rep. 1, 12 Supp. 81.

ARTICLE III.

ANSWER AND COUNTERCLAIM. § 1770. RULE 74.

§ 1770. [Am'd, 1881.] What is deemed a counterclaim.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, a cause of action against the plaintiff and in favor of the defendant, arising under either of said articles, may be interposed in connection with a denial of the material allegations of the complaint as a counterclaim.

Rule 74. Answer; trial.

The defendant, in the answer, may set up the adultery of the plaintiff or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.

In an action between husband and wife for a separation, on the ground of cruel treatment, etc., the defendant's misconduct is a defence, although it is not the cause of cruelty complained of. *Hopper v. Hopper*, 11 Paige, 46; *Doe v. Roe*, 23 Hun, 19. In an action *a vinculo*, defendant may have affirmative relief. *Finn v. Finn*, 62 How. 83. Defendant may set up as a counterclaim, both adultery and cruelty. *Spahn v. Spahn*, 12 Abb. N. C. 169. In a wife's action for divorce for adultery, while the fact that the adultery was committed with her connivance prevents a judgment in her favor, the husband, if he proves adultery by the wife without his connivance, is entitled to judgment for divorce. *Bleck v. Bleck*, 27 Hun, 296. In divorce for cruelty, plaintiff's misconduct, sufficient to entitle defendant to relief, is a complete defence. *Doe v. Roe*, 23 Hun, 19; *Palmer v. Palmer*, 1 Sheld. 89. In *McNamara v. McNamara*, 9 Abb. 18, an action for divorce for adultery committed by plaintiff is a defence and a good ground for affirmative relief in the action. *Anonymous*, 17 Abb. 48. An answer must state times, names and places where adultery was committed, as in a complaint where affirmative relief is asked. *Tim v. Tim*, 47 How. 253; *Morrell v. Morrell*, 3 Barb. 236; *Mitchell v. Mitchell*, 61 N. Y. 398. Where recriminating charges are made in an action of divorce, the same evidence is required to sustain them as in an original action. *Pollock v. Pollock*, 71 N. Y. 137. *Contra*, *Peck v. Peck*, 44 Hun, 290. Where defendant sets up a defence of adultery by plaintiff, the court may grant him a divorce even though he is a non-resident. *Fullmer v.*

Art. 3. Answer and Counterclaim.

Fullmer, 6 Week. Dig. 22, 42. And in answer it is not necessary to aver the residence of either party. *Leseuer v. Leseuer*, 31 Barb. 330. A counter-charge of adultery constitutes a counterclaim which requires a reply. *Leslie v. Leslie*, 11 Abb. (N. S.) 311. It was held, before the section as it stands in the Code, in *Diddell v. Diddell*, 3 Abb. 167; *Griffin v. Griffin*, 23 How. 183; *Linden v. Linden*, 36 Barb. 61, that, in an action for absolute divorce on the ground of adultery, the defendant could not interpose a demand for a limited divorce for cruel and wicked treatment; and, also, in *Henry v. Henry*, 17 Abb. 411, and *Terhune v. Terhune*, 40 How. 258, that, in an action for a limited divorce on the ground of cruelty, the defendant could not set up, as a defence or counterclaim, the adultery of the plaintiff, although the two last cases were not followed in *Doe v. Roe*, 23 Hun, 19. The language as it stands was evidently intended to establish a different rule in accordance with 17 Abb. 48, and 9 Abb. 18, *supra*. Ill conduct cannot be shown unless pleaded, nor can condonation. *Roe v. Doe*, 14 Hun, 612. A third person, made a defendant, cannot make recriminating charges against plaintiff. *Monroy v. Monroy*, 1 Edw. 382. Defendant may deny the misconduct and set up plaintiff's misconduct or condonation. *Smith v. Smith*, 4 Paige, 432; *Hopper v. Hopper*, 11 Paige, 46. In an action by a wife for separation, the defence was a denial and counterclaim of adultery on the plaintiff's part; counterclaim was satisfactorily proven by the deposition of two witnesses, and it was held that defendant was entitled to a decree for absolute divorce. *Jayne v. Jayne*, 5 Misc. 307.

In *De Meli v. De Meli*, 120 N. Y. 485, in an action for separation, the defendant set up adultery as a defence. The adultery of plaintiff may be set up as a counterclaim in an action for limited divorce and an affirmative judgment thereon demanded. The objection that the answer does not set up that the adultery was without the connivance, privity or procurement of defendant cannot be raised on demurrer. *Van Benthuyssen v. Van Benthuyssen*, 2 Supp. 238. The rule is also that in an action for separation on the ground of abandonment, the defendant may set up cruel and inhuman treatment not only as a defence but as a counterclaim, and on proof of the allegations, is entitled to a judgment for separation and reasonable support. *Waltermire v. Waltermire*, 110 N. Y. 183.

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A finding by a referee in favor of plaintiff without reference to a counterclaim setting up adultery on the part of the plaintiff, in support of which evidence was adduced, was held to be in violation of § 1758, subd. 4, and to call for a reversal of the judgment. *Griffin v. Griffin*, 70 Hun, 73, 53 St. Rep. 437, 23 St. Rep. 1070. Where the wife sued for a divorce and the husband counterclaimed for a separation, an award of counsel fee was made to her, and the decree denied the divorce without the counterclaim being adjudicated upon, *held*, that a motion for the return of the counsel fee should be denied. *Grauer v. Grauer*, 2 Misc. 98, 49 St. Rep. 354, 20 Supp. 854.

The defendant may, in connection with denial of the allegations of the complaint, plead in the answer as a counterclaim a cause of action existing in his favor against plaintiff for absolute divorce where the action is brought for a separation; this, it seems, was not so prior to the amendment to § 1770 by chapter 703 of the Laws of 1881. *Van Benthuyssen v. Van Benthuyssen*, 15 Civ. Pro. R. 238. The court has power to permit the defendant, in an action of divorce for adultery, to plead as a counterclaim as well as a defence by supplemental answer, acts of adultery committed by plaintiff since the action was begun, and it seems that the fact that both parties have noticed the action for trial does not deprive the court of power to permit a supplemental answer. *Blanc v. Blanc*, 67 Hun, 384, 51 St. Rep. 822.

Where an answer interposed by defendant contained allegations sufficient to bring the subject-matter within the provisions of § 1743, authorizing an action to be maintained to procure a judgment declaring a marriage contract void and annulling a marriage on the ground that the former husband or wife of one of the parties was living at the time of such marriage, and that the marriage with the former husband or wife was then in force, it was held that the court had jurisdiction of the person and subject-matter of the action. *Jones v. Jones*, 71 Hun, 519, 54 St. Rep. 885.

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Precedent for Answer—Setting Up Counterclaim.

SUPREME COURT—ULSTER COUNTY.

SAMUEL VAN STEENBURGH

agst.

MARY A. VAN STEENBURGH.

The defendant, for an answer to the complaint of the plaintiff herein, respectfully shows to the court:

First. She admits that she was married to the plaintiff, at the town of Saugerties, in the county of Ulster, and State of New York, in or about the year 1868, and denies that the said marriage occurred as aforesaid, on the 14th day of November, 1870.

Second. Said defendant specifically denies that five years have not elapsed since the plaintiff discovered the fact of such adultery, if any, so charged, and alleges that more than five years have elapsed since the said plaintiff has lived with the said Jacob Layman, mentioned in said complaint; that she has lived with said Jacob Layman since about the year 1876, in the same manner in every way that she has since the 1st day of June, 1883, and that said plaintiff had full knowledge of the same for more than nine years last past.

Third. For a third and further defence, and as a counterclaim herein, said defendant alleges that at divers places in the town of Saugerties, in the county of Ulster, N. Y., and at various times between the 1st day of January, 1880, and this time, but at what particular times and places the defendant is unable to state, the plaintiff has committed adultery with one Abbey Jane Terwilliger.

Fourth. For a fourth and further defence, and as a counterclaim herein, said defendant alleges that said plaintiff has since about the year 1879 or 1880, lived in the said town of Saugerties, with the said Abbey Jane Terwilliger, in open and notorious adultery.

Fifth. For a fifth and further defence, and as a counter-claim herein, said defendant alleges that said plaintiff, at the town of Saugerties, Ulster county, N. Y., and at various times between the 1st day of January, 1874, and this date, but at what particular times and places the defendant is unable to state, the plaintiff has committed adultery with various persons to this defendant unknown.

Sixth. That such adultery, above alleged, was committed without the consent, connivance, privity or procurement of defendant; that five years have not elapsed since the defendant discovered the fact of such adultery, so charged, and that defendant has not voluntarily cohabited with plaintiff since the commission of said adultery, or since the year 1873. Wherefore, the defendant demands that the complaint of the plaintiff be dismissed, with costs.

HALLOCK, JENNINGS & CHASE,

Defendant's Attorneys.

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ARTICLE IV.

JUDGMENT. RULES 72 IN PART, AND 76.

SUB. 1. HOW JUDGMENT TO BE TAKEN BY DEFAULT. RULE 72 IN PART. RULE 76.

2. JUDGMENT, HOW MODIFIED.

SUB. 1. HOW JUDGMENT TO BE TAKEN BY DEFAULT. RULES 72
IN PART, AND 76.

[See decisions and authorities under NULLITY, DIVORCE, and SEPARATION.]

Rule 72 in part. Reference on default; proof of service of summons and complaint; failure of defendant to answer.

When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, the court shall in no case order a reference to a referee nominated by either party nor to a referee agreed upon by the parties, nor without proof by affidavit conformable to the rules relating to the manner and proof of the service of the summons and complaint. Notice of appearance and retainer shall not be sufficient to excuse such proof. * * *

In an action for a divorce or for the annulment of a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court, and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll. The court may, however, in case the evidence is such that the public interest require that the examination of the witnesses should not be public, exclude all persons from the court room except the parties to the action and their counsel and the witnesses, and shall order such evidence, when filed with the clerk, sealed up and exhibited only to the parties to the action or some one specially interested upon order of the court.

Rule 76. Judgment not to be by default; copy of pleadings or testimony not to be furnished; no judgment to be entered except by court.

No judgment, annulling a marriage contract or granting a divorce, or for a separation or limited divorce, shall be made, of course, by the default of the defendant; or in consequence of any neglect to appear at the hearing of the cause, or by consent. Every such cause shall be heard after the trial of the issue, or upon the coming in of the proofs at a Special Term of the court; but where no person appears on the part of the defendant, the details of the evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of any court, with whom the proceedings in an adultery cause are filed, on or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of the suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party or the attorney or counsel of a party, who has appeared in the cause, without a special order of the court.

No judgment in an action for a divorce shall be entered except upon the special direction of the court.

In cases where application is made for judgment on default, the court is required to scrutinize the testimony closely and not

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to direct a judgment for divorce where it may be doubtful, uncertain or unsatisfactory. A finding of fact is not binding on the court when it is based in part on evidence improperly admitted. *Moore v. Moore*, 14 Week. Dig. 255.

SUB. 2. JUDGMENT, HOW MODIFIED.

In an action for divorce *a vinculo*, the jurisdiction of the court over the subject-matter of the action, and over the parties in respect to all matters involved in it, terminates with the entry of final judgment therein, save for the correction and enforcement of the judgment. Where the action is by the wife, her claim for alimony is to be determined by the situation of herself and husband at the time of making the decree. If no provision is made for her therein, it is to be presumed the court has decided adversely to her claim, and the decree is equally final as if such provision had been made. The court has no power, on subsequent application showing circumstances thereafter arising, to award alimony. *Kamp v. Kamp*, 59 N. Y. 212; followed, *Park v. Park*, 18 Hun, 466; *Johnson v. Johnson*, 65 How. 517; *Wells v. Wells*, 10 St. Rep. 248. Under the Revised Statutes, after the entry of a final judgment establishing a cause of action for a limited divorce, the court had no power to order an additional allowance for her support. There is no distinction in that respect between an action for limited and one for an absolute divorce. The history of legislation on this subject and the decisions considered. *Erkenbrack v. Erkenbrack*, 96 N. Y. 456. It is said in the opinion, Ruler, Ch. J., that the result reached in this case seems also to conform to the existing practice as provided by §§ 1766, 1769 and 1772, Code Civil Procedure, and will make the practice in this respect uniform, not only as to future but as to all existing decrees. It was held in *Crimmins v. Crimmins*, 28 Hun, 200, and *Johnson v. Johnson*, 18 Week. Dig. 27, that an application by the wife for modification of decree after judgment for her benefit as to maintenance of children could not be granted. In *Catlin v. Catlin*, 31 Hun, 632, it is held that modification of decree can be made under 2 R. S. 148, § 59, which is there said to be unrepealed as to decrees granted before the Code. This case is affirmed, 97 N. Y. 623, on the authority of *Erkenbrack v. Erkenbrack*, 96 N. Y. 456, *supra*, where it is held that an order made by the General Term, referring a petition back

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to a referee to ascertain and report a suitable and proper allowance for the care, custody and education of the children of the marriage, was authorized by statute.

The care, custody and education of children naturally requires expenses to be incurred for the accomplishment of the objects contemplated by statute, and, provision for their expenses arising afterward among other things was undoubtedly within the intention of the Legislature in framing that provision. Same rule is applicable under Code. See, to same effect, *Kerr v. Kerr*, 59 How. 255. Where the judgment provided that the amount be increased or diminished, to be paid thereafter, annually, if necessary, in order to preserve the equality of the respective incomes of husband and wife, *held*, that it was immaterial, in ascertaining defendant's income, whether it was due to property he had at the time of the decree or after-acquired property. *Milderberger v. Milderberger*, 12 Daly, 195.

ARTICLE V.

ALIMONY AND COUNSEL FEES. § 1769.

- SUB. 1. ALIMONY PENDENTE LITE IN ACTIONS FOR DIVORCE OR SEPARATION. § 1769.
2. ALIMONY PENDENTE LITE IN ACTION TO ANNUL A MARRIAGE.
 3. COUNSEL FEES.
 4. PRACTICE ON MOTION FOR ALIMONY AND COUNSEL FEES.
 5. ALIMONY IN FINAL JUDGMENT.

SUB. 1. ALIMONY PENDENTE LITE IN ACTIONS FOR DIVORCE OR SEPARATION. § 1769.

§ 1769. Alimony, expenses of action and costs; how awarded.

Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders, requiring the husband to pay any sum or sums of money necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such action may award costs, in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case; or the court may, in the judgment, or by an order made at any time, direct the costs to be paid out of any property sequestered or otherwise in the power of the court.

Alimony is the allowance which the husband pays to the wife while living apart from her, by order of the court, for her sup-

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port and maintenance; or it may be a provision ordered for her sustenance, to be paid to a wife by her divorced husband. *Bish. on Marriage and Divorce*, vol. 2, § 352.

Where a plaintiff brings an action against her husband, and sets forth facts entitling her to a separation, the statute does not authorize the action for support and maintenance as a distinct, substantive relief, and there is no authority to make an order for support and maintenance. *Atwater v. Atwater*, 36 How. 431. The circumstances under which a decree for maintenance may be made must be of such a nature as would justify separation. *Ruckman v. Ruckman*, 58 How. 278. See *Davis v. Davis*, 75 N. Y. 221; *Ramsden v. Ramsden*, 91 N. Y. 281, and other cases cited under § 1766. Alimony may be granted in an action for separation although not demanded in the complaint. *Hecht v. Hecht*, 14 Misc. 597, 36 N. Y. Supp. 271, 71 St. Rep. 10.

Where the marriage relation does not exist, there is no ground for making allowance for counsel fees. *Hopper v. Hopper*, 92 Hun, 416. Alimony and counsel fees will not be allowed where a marriage in fact is not shown, and the cohabitation was originally illicit. *Humphreys v. Humphreys*, 49 How. 140. But alimony is not confined to cases where both parties admit the marriage to have been legal; *North v. North*, 1 Barb. Ch. 241, and it was held in *Smith v. Smith*, 1 Edw. 255, that on wife's bill for separation, a denial of marriage, but not of cohabitation or cruelty, was no answer to an application for temporary alimony. Alimony and counsel fees will be allowed though the wife, who has contracted a second marriage, allege that her marriage with the plaintiff was dissolved by a foreign divorce. *Starkweather v. Starkweather*, 29 Hun, 488. Alimony and allowance for expenses will not be allowed, in an action brought by the wife, where marriage in fact is denied by the answer, until the actual existence of the marital relation is proved to the satisfaction of the court, or is admitted. It is not necessary that the fact be so conclusively established as on an application for permanent alimony or other ultimate purposes of the action. If the putative wife make out a reasonably plain case, she should be allowed alimony, although her claim is denied by the husband. *Brinkley v. Brinkley*, 50 N. Y. 184. Marriage must be admitted, or proof must be submitted sufficient to authorize the court to determine that the applicant is the wife of defendant; and when facts are

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stated showing the contrary, such facts, if uncontroverted, will prevent an allowance. The *onus* is on the applicant for alimony to show the fact of marriage with certainty. Where, at the time of the alleged marriage, plaintiff believed herself competent to marry, but was in fact under a disability, which subsequently ceased, proof of cohabitation without any new marriage contract, and in reliance on the validity of the original marriage, is not satisfactory proof of valid marriage for allowance of alimony. *Collins v. Collins*, 71 N. Y. 269.

Pending a bill by wife for divorce, the court will make an order for maintenance *pendente lite*, and also a sum to defray her expenses of suit. *Denton v. Denton*, 1 Johns. Ch. 364; *Osgood v. Osgood*, 2 Paige, 621; *Collins v. Collins*, 2 Paige, 9. The poverty of the husband is not an excuse. *Pursell v. Pursell*, 3 Edw. 194. Such allowance, *pendente lite*, will be limited to the actual wants of the wife. *Saunders v. Saunders*, 2 Edw. 491; *Germond v. Germond*, 4 Paige, 643; *Morrell v. Morrell*, 2 Barb. 280. *Contra, Leslie v. Leslie*, 6 Abb. (N. S.) 193. It may be increased in accordance with the wife's necessities and the husband's ability. *Forrest v. Forrest*, 5 Bosw. 672. The means of the husband are to be considered, and the circumstances in life of the parties; *Hallock v. Hallock*, 4 How. 160; and alimony is allowed, although she can earn money by her occupation. *Hoffman v. Hoffman*, 7 Robt. 474. The authority of the court to allow counsel fees depends on § 1769. The allowance looks to the future; she cannot be allowed a sum to pay expenses already incurred. The power of the court is limited to the allowance of such sums *pendente lite* as will enable her to carry on or defend the action. If she has made her defence on her own credit, she may not, before judgment, have an order compelling her husband to pay such expenses. An allowance for past expenses may be made, it seems, where it is shown necessary to make payment to carry on the action further. *Beadleston v. Beadleston*, 103 N. Y. 402.

But alimony *pendente lite* is always much smaller than after judgment. *Simmons v. Simmons*, 2 Robt. 212; *Leslie v. Leslie*, 6 Abb. (N. S.) 193. There is no fixed rule as to the amount; it may, if necessary, include a sufficient sum to enable the wife to spend the winter in a tropical climate for the benefit of her health. *Lynde v. Lynde*, 4 Sandf. Ch. 373; s. c. 2 Barb. Ch. 72. The amount of temporary alimony must be regulated by the wife's

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necessities and husband's ability. *DeLlamosas v. DeLlamosas*, 2 Hun, 380. Temporary alimony may be given, pending a reference as to permanent alimony, though no order was made before the decree. *Forrest v. Forrest*, 5 Bosw. 672. Alimony is in the discretion of the court. *McDonough v. McDonough*, 26 How. 193; *Miller v. Miller*, 43 How. 125; *Douglas v. Douglas*, 13 Abb. (N. S.) 291; *Gilbert v. Gilbert*, 15 St. Rep. 822; *Galusha v. Galusha*, 43 Hun, 181. But nothing but money can be ordered as temporary alimony; cannot order use of horses and carriage. *Simmons v. Simmons*, 2 Robt. 712. A woman who intervenes in an action of divorce, claiming to be the lawful wife, may be allowed alimony and counsel fees. The alimony ceases when she is dismissed from the case as a party, but she may be allowed a counsel fee to prosecute an appeal. *Anonymous*, 15 Abb. (N. S.) 307. Alimony and counsel fees will not be allowed where there is no probability that the wife will succeed in her suit. *Strong v. Strong*, 1 Abb. (N. S.) 358; *Coddington v. Coddington*, 10 Abb. 450; *Jones v. Jones*, 2 Barb. Ch. 146; *Worden v. Worden*, 3 Edw. Ch. 387; *Desbrough v. Desbrough*, 29 Hun, 592. Where a wife is defendant, the court will not make an order for alimony and expenses until she has disclosed the nature of her defence. *Lewis v. Lewis*, 3 Johns. Ch. 519. Affidavits are admitted for the purpose of fixing the amount. *Lcslic v. Lcslic*, 6 Abb. (N. S.) 193; *Wright v. Wright*, 1 Edw. 62; *Hammond v. Hammond*, Clarke, 151; *Hallock v. Hallock*, 4 How. 160. On a reference as to temporary alimony, the wife need not prove her case on the merits. *Fowler v. Fowler*, 4 Abb. 411; *Herforth v. Herforth*, 2 Abb. 483.

An order of the Supreme Court granting alimony and counsel fees in a matrimonial action is discretionary, but like all discretionary orders, is reviewable upon an appeal to the Appellate Division. In fixing the amount of alimony the court should take into consideration the nature of the action, whether or not the wife has a good cause of action, the probable difficulty in proving her case, the strength of the case she is required to meet, the probable expense of carrying on the litigation and the means of the husband, including his expenditures and his apparent condition. Alimony and counsel fees should never be given to a wife merely to punish a husband because he refuses to consent to a reference of the action, or because it is shown by the proceedings

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that he is an unworthy person. An order doubling the amount of alimony and counsel fees, in case the defendant, the husband, refuses to consent to a reference, is entirely unwarranted. *Patterson v. Patterson*, 4 App. Div. 146.

The General Term has power to review the discretion exercised by the Special Term in allowing a certain amount to the wife in an action brought by her for divorce "for repayment of sums expended by her in her support and maintenance," since the commencement of the action, and strike out the allowance as improvidently made under all the circumstances, but it has no right to do so upon the ground that the lower court had no power to allow it. *Percival v. Percival*, 35 St. Rep. 340, affirmed, 124 N. Y. 637, holding, further, that it must appear from the order that the action of the General Term in striking out the allowance was based on the want of power in the court below to authorize this court to review it. In order to be reviewable in Court of Appeals, the opinion cannot be resorted to to determine the grounds of the decision. Distinguishing *Beadleston v. Beadleston*, 103 N. Y. 402, upon the ground that the subject there under review was an order made *pendente lite* after the referee had made his report which convicted the wife of adultery, although no judgment had been entered. Alimony may, in the discretion of the court, be made payable from the commencement of the action. *McCarthy v. McCarthy*, 143 N. Y. 235, 38 N. E. Rep. 288, 62 St. Rep. 184. While the court has power to increase alimony, such increase should not be granted unless new facts are shown which did not exist or were not known to the applicant when the former order was made. *Straus v. Straus*, 38 St. Rep. 478, 14 Supp. 671.

Pending appeal by a defendant from a judgment against him for a limited divorce, upon which appeal he has stayed proceedings under the judgment, the action is still pending so long as the appeal is undetermined, and the court has power to make an allowance for the support of the plaintiff and by way of counsel fees to enable her to defend the appeal. *McBride v. McBride*, 55 Hun, 401, 29 St. Rep. 256, 8 Supp. 448, and under the decision on appeal, 119 N. Y. 519, 30 St. Rep. 78, it seems that after judgment and pending an appeal, the court has power to make an order for the payment of alimony and counsel fees to enable the wife to defend the appeal, but that to avoid compelling a double

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payment the court should require as a condition that the plaintiff stipulate the sum allowed shall in case of an affirmance for judgment, be applied as a payment thereof. Distinguishing *Kamp v. Kamp*, 59 N. Y. 212, and *Erkenbrack v. Erkenbrack*, 96 N. Y. 456.

Under § 1769, authorizing the court in an action for divorce to make an order requiring the husband to pay a sum necessary to enable the wife to carry on or defend the action, such an allowance may not be made to defray expenses already incurred unless it appears that their payment is necessary in order to enable the wife further to prosecute or defend. In such an action brought by the wife after the referee reported in her favor, requiring defendant to pay alimony from the commencement of the action and the report had been confirmed, the plaintiff moved "for counsel fees and extra allowance of costs in addition to plaintiff's taxable costs and disbursements," it was held the motion was properly denied. It seems that if after entry of judgment in such case defendant should appeal, and upon motion then made it should appear that the wife has incurred expenses which it would be necessary for her to pay in order to maintain or prosecute her rights under the judgment, the court would be authorized to make an allowance including therein such expenses. *McCarthy v. McCarthy*, 137 N. Y. 500.

The court has no power to grant an allowance to pay for past services even though the party's counsel is unwilling to act in the future unless paid for such services. Such statement is insufficient to show that payment is essential to enable the party to further maintain or prosecute her rights. *Emerson v. Emerson*, 26 Supp. 292. Orders granting alimony and counsel fees in divorce cases are largely in the discretion of the Special Term and will not be interfered with unless it clearly appears that such discretion has been abused. *Aldrich v. Aldrich*, 74 Hun, 638, 56 St. Rep. 345, 26 Supp. 344.

Alimony pending the trial is discretionary, and ordinarily the General Term will not interfere with purely discretionary orders, but where there has been a palpable abuse of the discretion vested in the court at Special Term, or where it has been controlled by improper considerations, the General Term will review the order so held where the wife was compelled to waive a jury trial as a condition granting temporary alimony. *Loventhal v. Loventhal*, 68 Hun, 366, 51 St. Rep. 883. After an order has been

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granted and an allowance made for counsel fees and expenses, but refusing alimony, she cannot on the same grounds move at another Special Term for an additional allowance without showing a different state of facts. *Simonds v. Simonds*, 10 Supp. 606; S. C. 32 St. Rep. 127, 57 Hun, 290.

The court, in granting alimony *pendente lite*, should consider that the party directed to pay money may be right in the end and should provide as far as possible for such a contingency. *Uhlmann v. Uhlmann*, 17 Week. Dig. 282. Where the complaint and affidavits show a cause of action for divorce within the jurisdiction of the courts of this State, and that plaintiff is a resident, and defendant was served in this State and has appeared, the court has power to award alimony to the plaintiff although she has demurred to the answer, alleging that both parties were residents of another State at the commencement of the action and that the court had no jurisdiction. *Gray v. Gray*, 143 N. Y. 354, 38 N. E. Rep. 301, 62 St. Rep. 350.

The wife is entitled to alimony up to the final decree, though there be a verdict against her. *Stanford v. Stanford*, 1 Edw. 317. But in case of an appeal by her, there must be a new application. *Moncrief v. Moncrief*, 15 Abb. 187. The order for alimony is superseded by the judgment. *Wood v. Wood*, 7 Lans. 204. An order for alimony *pendente lite* may be enforced by injunction and receiver. *Carey v. Carey*, 2 Daly, 424. On discontinuance of an action for divorce, the court may direct the payment of an additional counsel fee to the wife's attorney. *Green v. Green*, 40 How. 465. After an order for the payment of alimony and counsel fees, the plaintiff cannot discontinue without an order of the court or payment of the sum fixed. *Leslie v. Leslie*, 10 Abb. (N. S.) 64. It is improper in the order directing alimony to order the payment of arrears; the payment must be left to be enforced in the ordinary way. *Galinger v. Galinger*, 4 Lans. 473; *Hoffman v. Hoffman*, 55 Barb. 269, affirmed, 46 N. Y. 30, on other grounds. Where only a short time intervenes between the application and the order for temporary alimony, it may be ordered paid from the date of application, but where seven years had intervened, *held*, it should only be directed paid from date of the order. *Collins v. Collins*, 10 Hun, 272, reversed on other grounds, 71 N. Y. 269. Alimony may be increased pending suit. *Leslie v. Leslie*, 11 Abb. (N. S.) 311; *Forrest v.*

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Forrest, 5 Bosw. 672. But it should not be increased if, with voluntary payments by the husband, it seems sufficient. *Morrell v. Morrell*, 2 Barb. 480. If there is unreasonable delay in prosecuting suit, it is ground for discontinuance of alimony. *Fowler v. Fowler*, 4 Abb. 411. But though new trial was rendered necessary by disagreement of jury, further sum was not allowed in *Kittle v. Kittle*, 8 Daly, 72. Where plaintiff in divorce has obtained an order for alimony, and subsequently brings an action for the same cause in another State, the order should be stayed until the abandonment of the latter action. *Nichols v. Nichols*, 12 Hun, 428.

An allowance of permanent alimony, to a wife who obtains a divorce, is not affected by her subsequent marriage to another husband. *Sheppard v. Sheppard*, 1 Hun, 240, affirmed, without opinion, 58 N. Y. 644; *Moore v. Moore*, 8 Abb. N. C. 171. Where all the facts upon which plaintiff's right to a divorce are based are denied by defendant, and the preponderance seems to be with the latter, alimony should not be allowed, but the case should be sent to a referee to determine the facts. *Brennan v. Brennan*, 19 Week. Dig. 342. In fixing the amount of alimony the court is not limited to what is barely sufficient to support the wife, but the ability of the husband and his conduct in the controversy, leading to the suit, are to be considered. *Tearle v. Tearle*, Abb. Ann. Dig. 1884, p. 5. A statement of the amount of the husband's annual income should be plainly denied in order to reduce the amount of alimony. *Lloyd v. Lloyd*, 18 Week. Dig. 364. A plaintiff is not released from the obligation of paying weekly alimony *pendente lite* by the filing of a referee's report in his favor; his obligation does not cease till entry of judgment. *Beadleston v. Beadleston*, 23 Week. Dig. 365. Where the wife was a drunkard, and her husband made her a weekly allowance, a reference was ordered to ascertain if it was sufficient, and if she was to be trusted with the money. *Saunders v. Saunders*, 2 Edw. 491. An order for temporary alimony and expenses will not be made where it is reasonably certain that the wife has ample resources of her own. *Maxwell v. Maxwell*, 28 Hun, 566. But while the fact that a wife has means is to be considered, it does not bar her rights or deprive her of alimony, where it appears that an allowance is necessary. *Merritt v. Merritt*, 90 N. Y. 643; distinguishing *Collins v. Collins*, 80 N. Y. 1, holding that,

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where the wife had suitable provision already made her by the husband, alimony *pendente lite* should not be granted. When an order has been made granting alimony to defendant, the court may make an order discontinuing the same unless defendant shall consent to appear upon the trial for the purpose of identification by plaintiff's witnesses. *Jacobson v. Jacobson*, 12 Civ. Pro. R. 198.

Alimony and counsel fees may be granted to a wife pending her appeal in an action for divorce where it appears that the appeal is in good faith and for a reasonable cause. *Halstead v. Halstead*, 11 Misc. 592, holding that the action within the purview of § 1769 is pending so long as the appeal is undetermined, citing *McBride v. McBride*, 119 N. Y. 519. An order granting alimony in an action for absolute divorce cannot be made conditional upon defendant's consent to a trial by referee, as the defendant is entitled of right to a trial by jury and does not lose such right by delay in moving to have issues framed for trial. *Ulbricht v. Ulbricht*, 89 Hun, 479, 35 Supp. 324.

Alimony *pendente lite* can only be granted for future support and should commence from the time of the application therefor. *Thrall v. Thrall*, 83 Hun, 188, 31 Supp. 591, 64 St. Rep. 145. Alimony *pendente lite* will not be granted in a suit for divorce on the ground of adultery where all the charges are made on information, and it does not appear that plaintiff believes the charges and defendant positively denies them. *Moriarty v. Moriarty*, 10 Supp. 228.

Alimony *pendente lite* will be allowed in an action for divorce where there is some competent evidence of the defendant's guilt. *Gray v. Gray*, 78 Hun, 610, 60 St. Rep. 225, 28 Supp. 856. Where the answer in an action by a wife for absolute divorce sets up counter-charges of adultery, the investigation of which involves long and expensive litigation, an allowance to meet the expenses thereof will be granted although she is not entitled to the alimony. *Shaw v. Shaw*, 26 Supp. 715.

Under § 1769 an allowance cannot be made for past expenses to the wife. *Straus v. Straus*, 50 St. Rep. 845, citing *Beadleston v. Beadleston*, 103 N. Y. 402, 3 St. Rep. 634. A wife who denies on oath the charges made against her, is entitled to an allowance for counsel fees to defend the action, although the opposing affidavits show her guilty. Poverty of the husband is no defence to

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such an application. *Cohen v. Cohen*, 11 Misc. 704, 32 Supp. 1082, 66 St. Rep. 336.

The wife when sued for divorce is entitled to alimony and counsel fees, and when she denies under oath the charges in the complaint, although it may appear from the affidavits instituted by the husband that she is guilty of the charges. Poverty of the husband, although taken into account in fixing the amount, will not furnish ground for the denial of any alimony. *Rublinsky v. Rublinsky*, 24 Supp. 920; *Walsh v. Walsh*, 4 Misc. 448, 54 St. Rep. 158, 24 Supp. 335. The rule is to allow only such alimony as the husband is able to pay and is sufficient to properly support the wife and enable her to try the action, taking into consideration the nature of the husband's means and the situation of the parties in society. *Wells v. Wells*, 10 St. Rep. 248; *Gilbert v. Gilbert*, 15 St. Rep. 822.

In making an allowance, it is not proper to provide for the transfer of household furniture to the wife and daughter of the guilty party. It should compel the husband to support them by supplying their needs. *Doe v. Doe*, 52 Hun, 405; s. c. 24 St. Rep. 364. See *Browne v. Browne*, 9 Civ. Pro. R. 180, as to what is required to be shown to entitle the wife to temporary alimony. A married woman who has received an allowance under § 1769 is not entitled to a further allowance unless it appears that such allowance is necessary to enable her to carry on the litigation. *Stamper v. Stamper*, 11 Supp. 588.

Where it was stipulated that no application for further counsel fees or alimony should be made "until the result of this action is reached;" held, that the stipulation was not a bar to an application for payment by the husband of the wife's expenses at the next trial. *Van Wormer v. Van Wormer*, 11 Supp. 247. The amount of alimony can at any time be increased by consent of defendant. *Stahl v. Stahl*, 12 Supp. 854, distinguishing *Kamp v. Kamp*, 59 N. Y. 212. Alimony was reduced on appeal in the following cases: *Williams v. Williams*, 25 St. Rep. 183; s. c. 17 Civ. Pro. R. 297, 6 Supp. 645; *Galusha v. Galusha*, 43 Hun, 181; *Hardy v. Hardy*, 6 Supp. 300; s. c. 25 St. Rep. 832; *Straus v. Straus*, 14 Supp. 671.

Upon dismissal of the complaint in a husband's action for divorce, on the ground of adultery, the court may allow alimony and counsel fee. *Freeman v. Freeman*, 8 Abb. N. C. 174. The

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general rule is to allow alimony to a wife, almost as of course. *Leslie v. Leslie*, 6 Abb. (N. S.) 193. This is so where she denies the guilt or sets up forgiveness or recrimination, unless the court is satisfied she is in the wrong. *Strong v. Strong*, 1 Abb. (N. S.) 358; *Clark v. Clark*, 7 Robt. 284; *Ford v. Ford*, 10 Abb. (N. S.) 74. She will be allowed alimony and counsel fees unless it is apparent she has no case, where she sues for divorce on ground of adultery; *Miles v. Miles*, 6 Week. Dig. 559; and the husband's poverty is not an answer to the application. *Purcell v. Purcell*, 3 Edw. 194; *Hallock v. Hallock*, 4 How. 160. An allowance was granted to enable a wife to sue for divorce, although her husband had an action pending in another State, it not appearing that in that State defendant could have affirmative relief. *Whitney v. Whitney*, 22 How. 175. Where the wife answered, alleging adultery on the part of the husband, and that she had, on that ground, procured an absolute divorce from him in another State, and subsequently married the person with whom plaintiff claimed she had committed the adulterous acts, for which he sought a divorce, *held*, that the case was one in which the court should exercise its discretion as to granting an allowance on an application by the wife. *Starkweather v. Starkweather*, 29 Hun, 488. Alimony will be refused if the charges of adultery are on information and belief and defendant denies them. *Monk v. Monk*, 7 Robt. 153. And so where a strong case was made out against the wife. *Koch v. Koch*, 42 Barb. 515. Where the evidence before the referee shows that the wife, being plaintiff, is in fault, and is not without means, alimony will be denied. *Harrison v. Harrison*, 2 Law Bull. 56. Alimony may be allowed the wife in an action against her for a divorce. *Ford v. Ford*, 10 Abb. (N. S.) 74; *Leslie v. Leslie*, 10 Abb. (N. S.) 64, Ct. of App. This is in the discretion of the court. *Jones v. Jones*, 2 Barb. Ch. 146; *McDonough v. McDonough*, 26 How. 193. Alimony is not granted to the wife, in an action for adultery against her, by the husband, where a gross case is made out against her; *Griffin v. Griffin*, 23 How. 189; *Koch v. Koch*, 42 Barb. 515; and even if the husband has recovered a verdict against a person for adultery with the wife, that fact is said to be no answer to an application for alimony if she denies the adultery. *Williams v. Williams*, 3 Barb. Ch. 628. The disagreement of a jury, on a trial, shows reasonable ground for defence, and authorizes alimony. *Strong v. Strong*, 1 Abb. (N. S.) 358. Alimony

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was refused where it appeared that the wife had had a prior husband and had obtained a limited divorce from him shortly before her marriage with plaintiff, although she swore she had not heard of him for nine years. *Kinzey v. Kinzey*, 7 Daly, 460. Where, in an action by the wife, recriminating charges of adultery are made, unless the proof is controverted, alimony *pendente lite* will be denied. *Collins v. Collins*, 71 N. Y. 269. On reference in wife's suit to ascertain proper amount of alimony and counsel fees *pendente lite*, proof of her misconduct is admissible only to show it was so glaring that no aid should be given her to prosecute. *Fowler v. Fowler*, 4 Abb. 411. See *Wells v. Wells*, 10 St. Rep. 248, as to construction there given of §§ 1759 and 1771; also for citation of authorities as to alimony.

The application of defendant for alimony and counsel fee in an action for absolute divorce brought by the husband will be denied only when it appears from the facts before the court that the wife's guilt and the husband's innocence preclude any reasonable doubt of ultimate judgment for plaintiff. *Fricket v. Fricket*, 4 Misc. 382, 24 Supp. 483.

In general, if a wife is sued for divorce, in her answer either denies her guilt or sets up affirmative defences, such as forgiveness or recrimination, counsel fee and alimony will be allowed her unless the court is satisfied that she is altogether in the wrong or has no reasonable ground of defence; but it was further held that when the Special Term reaches that conclusion from evidence which may reasonably justify it, the Appellate Court should not interfere with the exercise of its discretion in refusing alimony. *Strong v. Strong*, 1 Abb. (N. S.) 358.

In wife's suit for separation a meritorious cause must be shown; a single instance of cruelty with vague charges of others, is not sufficient. *Hollerman v. Hollerman*, 1 Barb. 64; *Solomon v. Solomon*, 28 How. 218; *Worden v. Worden*, 3 Edw. 387; *Bertschy v. Bertschy*, 14 Week. Dig. 111. Granting alimony in a suit for limited divorce is discretionary, and it will be denied where conflict of evidence creates doubts of ultimate success, especially where the plaintiff has an income of her own sufficient for support. Counsel fees, however, will be granted where plaintiff's statement makes out a *prima facie* case. *Douglas v. Douglas*, 13 Abb. (N. S.) 291; *Carpenter v. Carpenter*, 19 How. 539. General allegations of abandonment and of neglect to support are insufficient.

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Bouton v. Bouton, 3 Robt. 715. The wife must make it appear that she has been injured and has a cause of action to entitle her to alimony. *Jones v. Jones*, 2 Barb. Ch. 146; *Bissell v. Bissell*, 1 Barb. 430; *Browne v. Browne*, 9 Civ. Pro. R. 180. After judgment for separation awarded the husband in an action against his wife, the court has no power to order an allowance for her support. *Waring v. Waring*, 100 N. Y. 570. In an action brought for separation on the ground of cruelty, the General Term held that the pleadings in the action and the evidence taken before the referee were sufficient to authorize the making of an allowance for support and counsel fees. *De Llamosas v. De Llamosas*, 2 Hun, 280; appeal dismissed, 62 N. Y. 618. Where the wife allows the bill to be taken as confessed, she cannot, on affidavits that the material charges are false, have an allowance. *Perry v. Perry*, 2 Barb. Ch. 285. Application for alimony denied where it appeared that the alleged abandonment consisted in the wife's refusal to live elsewhere than in a residence of her own selection. *Bethune v. Bethune*, 5 Law Bull. 71.

An order for the payment of alimony and counsel fees cannot be granted in an action for separation where the case presented does not justify a decree of divorce or separation. *Ramsden v. Ramsden*, 28 Hun, 285; on appeal, 91 N. Y. 281. In an action for limited divorce, on ground of abandonment, the fact that the wife has voluntarily left the husband and does not purpose to return, is an answer to an application for alimony. *Desbrough v. Desbrough*, 29 Hun, 592. Licentious conduct on the part of the wife would greatly diminish her claim for maintenance and wholly destroy it if it existed before the first cruel treatment. *Bedell v. Bedell*, 1 Johns. Ch. 604. See *Peckford v. Peckford*, 1 Paige, 274. Where the wife is destitute and shows merits, alimony will be allowed. *Snyder v. Snyder*, 3 Barb. 621.

In actions for separation, in the Superior Court, alimony and counsel fees were refused in *Patton v. Patton*, 13 Misc. 726, 35 Supp. 250, 69 St. Rep. 567, and *Ruopp v. Ruopp*, 35 Supp. 251. In an action for separation on the ground of neglect and refusal to support plaintiff, an order for alimony and counsel fee may be made on motion in the action without instituting proceedings therefor by petition. *Kirsch v. Kirsch*, 45 St. Rep. 287, 18 Supp. 447. In an action for a judicial separation where defendant committed bigamy by marrying plaintiff, a motion for

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alimony and counsel fee cannot be granted as no marital relation exists between the parties. *Blinks v. Blinks*, 5 Misc. 193. An agreement entered into by parties for separation through a trustee, by which the husband becomes bound to contribute a specified sum toward the support of his wife and child, is binding on the parties so long as it remains unrevoked and may properly be followed in the decree of divorce as to the provisions for the wife, but is not binding upon the child. *Atherton v. Atherton*, 82 Hun, 179, 31 Supp. 977, 64 St. Rep. 798.

An agreement in a deed for separation for the payment of a specified sum for the wife's support, and that upon default an order for alimony at the same amount may be granted in an action for divorce, precludes the husband from objecting to order granting such alimony. *Thrall v. Thrall*, 83 Hun, 188, 31 Supp. 591, 64 St. Rep. 145. A stipulation not to ask for further counsel fees or alimony in a divorce suit "until the result of the action is reached," held not to bar a further application where the jury had disagreed. *Van Wormer v. Van Wormer*, 33 St. Rep. 31, 11 Supp. 247. A decree allowing alimony at twenty dollars per week, payable in sums of forty dollars semi-monthly, after payment and receipt of the semi-monthly sums for several years without objection, will not be construed as requiring the payment of more than \$960 per year. *Mooney v. Mooney*, 10 Misc. 386, 63 St. Rep. 403, 31 Supp. 118. Where plaintiff sued for divorce on the ground of adultery and obtained an order granting her counsel fees but no alimony, and it appeared that five years previously she had obtained an absolute divorce in another State on the same ground, and that defendant had since married outside of this State a woman with whom plaintiff now claimed he committed adultery, plaintiff alleging that the first divorce was void; *held*, that the order granting counsel fees should be reversed, as plaintiff was entitled neither to them nor to alimony. *Ober v. Ober*, 28 St. Rep. 32, 7 Supp. 843.

Alimony will not be granted in actions for absolute divorce where all the charges of adultery are made on information and belief, if the defendant positively denies the charges. *Moriarty v. Moriarty*, 32 St. Rep. 115.

SUB. 2. ALIMONY PENDENTE LITE IN ACTION TO ANNUL A MARRIAGE.

Alimony and counsel fees were allowed heretofore in actions for nullity, and the power to grant them is one of the inherent

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powers of the court. *Lec v. Lec*, 66 How. 207; *O'Dea v. O'Dea*, 31 Hun, 441, affirmed, 95 N. Y. 667. It is said in *Isaacsohn v. Isaacsohn*, 3 Law Bull. 73, that where an action to annul a marriage is brought by the husband against the wife, alimony and counsel fees should be allowed, but not where the wife brings the action. Same principle, *Bloodgood v. Bloodgood*, 59 How. 42. Temporary alimony and expenses will be allowed in suit for nullity of marriage on ground of impotency. *Allen v. Allen*, 8 Abb. N. C. 175. See *Bloodgood v. Bloodgood*, 59 How. 42, *supra*, and *Bartlett v. Bartlett*, Clark's Ch. 460.

In a husband's suit for nullity, where the wife on oath denies the illegality, she is entitled to alimony and counsel fees. *North v. North*, 1 Barb. Ch. 241. In a husband's suit for nullity on the ground that the wife had a previous husband living, which was not denied, alimony and counsel fees were refused. *Appleton v. Warner*, 51 Barb. 270. In an action brought by a husband against a wife on the ground of former marriage, the court has power, upon the final decree in favor of the wife, to award her extra expenses and counsel fees beyond the taxable costs. Citing *Germond v. Germond*, 1 Paige, 83; *Kendall v. Kendall*, 1 Barb. Ch. 610; *Graves v. Graves*, 2 Paige, 62; *Griffin v. Griffin*, 47 N. Y. 134.

Although the Code, respecting the power of the court to allow alimony, applies only to actions for divorce for causes arising after marriage, and not to actions for divorce on the ground of the nullity of the marriage contract, yet, in an action brought by the husband to have a marriage declared void on the ground that the defendant had a former husband living at the time of such marriage, the power to allow a wife alimony and counsel fees *pendente lite* exists independent of the statute, and as incident to the jurisdiction of the court in such actions. *O'Dea v. O'Dea*, 31 Hun, 441, affirmed, 95 N. Y. 667. See, *contra*, *Michelson v. Michelson*, Abb. Ann. Dig. 1884 page 5.

In an action brought by a wife against the husband to annul the marriage on the ground of fraud, the court has no power to grant alimony and counsel fees *pendente lite* to the plaintiff. *Meo v. Meo*, 22 Abb. N. C. 58, 18 St. Rep. 270, 2 Supp. 569, 15 Civ. Pro. R. 308. Judge O'Brien, in the opinion at Special Term, holds that the provisions for alimony and counsel fees are limited to actions for divorce and separation, citing § 1769: further, that a

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distinction was made under the Revised Statutes between the actions brought by the wife and those brought against the wife to set aside the marriage contract, citing *North v. North*, 1 Barb. Ch. 241, and *Griffin v. Griffin*, 47 N. Y. 134, where it is held that the wife cannot consistently claim the husband is under obligation to provide her with means to carry on her suit against him where she denies the existence of the marriage, and further holds that the practice of the courts is against the granting of such alimony, citing *Bloodgood v. Bloodgood*, 59 How. 42, and *Isaacsohn v. Isaacsohn*, 3 Month. Law Bull. 73, referring to *Allen v. Allen*, not reported, decided at Special Term of the Supreme Court, and *Anonymous*, 15 Abb. (N. S.) 307, as holding the contrary rule.

A note is appended to the *Meo* case, 22 Abb. N. C. 58, *supra*, calling attention to the decision in *O'Dea v. O'Dea*, 31 Hun, 441, which was affirmed without opinion in 95 N. Y. 667, sustaining a motion by the wife for alimony and counsel fee in an action against her by her husband to annul the marriage on the ground that the wife had a former husband living, and holds, upon the authority of *Griffin v. Griffin*, 47 N. Y. 134; *Brinkley v. Brinkley*, 50 N. Y. 184, that the power to grant counsel fee and alimony exists independently of statute and is not an incident to the jurisdiction in actions for divorce on the ground of nullity.

An allowance to defendant in an action for the annulment of a marriage of \$750 for legal services, where plaintiff was in receipt of \$20,000 a year income, and defendant had only her theatrical wardrobe and \$2,800 savings, was held proper. *Sinn v. Sinn*, 3 Misc. 598, 52 St. Rep. 855, 23 Supp. 339.

In *Vincent v. Vincent*, 16 Daly, 534, 17 Supp. 497, citing a number of authorities, the rule in *Brinkley v. Brinkley*, 50 N. Y. 184, was followed allowing alimony *pendente lite* where, although defendant sought to avoid the alleged marriage by claiming his own prior marriage to another, the case of the plaintiff was not shown to be hopeless on that issue.

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An order for counsel fees was reversed where the parties have settled their differences and returned to cohabitation. *Chase v. Chase*, 29 Hun, 527. *Contra, Loudon v. Loudon*, 65 How. 411. A counsel fee may be granted in a suit for limited divorce where plaintiff's statement makes out a *prima facie* case and her income

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is not sufficient to support her and to bear the expense of a suit although alimony is refused. *Bertschy v. Bertschy*, 14 Week. Dig. 111. Though the husband has, on a voluntary separation, made provision for her support, which she has accepted, the wife may still be allowed a counsel fee where she has answered, alleging her husband's adultery, although she cannot have alimony. *Miller v. Miller*, 43 How. 125. Where, six months before action brought, articles of separation were entered into by husband and wife, where suitable provision was made for the wife's maintenance, temporary alimony should not be allowed her in a subsequent suit for divorce, but she may be allowed the expenses of the litigation. *Collins v. Collins*, 80 N. Y. 1. A judgment of separation in favor of a wife against a husband, in which a gross allowance is made and declared to be in full of alimony, is a bar to alimony in a husband's subsequent action for adultery, but she may have a counsel fee, and, if she retains the gross sum, may renew the motion. *McDonough v. McDonough*, 26 How. 193.

An order may be made that the husband pay a sum to be used for a specific purpose in the suit, as for the payment of referee's fees. *McQuien v. McQuien*, 61 How. 280; *Schloemer v. Schloemer*, 49 N. Y. 82; *Beadleston v. Beadleston*, 9 Civ. Pro. R. 440. Where an action had been pending ten years, and not brought to trial by defendant, an allowance for counsel fees was held proper. *Collins v. Collins*, 80 N. Y. 1. The allowance for alimony and expenses in an action for divorce is within the jurisdiction of the court of original jurisdiction, and unless so gross and excessive as to show an abuse of judicial discretion, is not reviewable by the Court of Appeals. Proof of the amount of labor, or the value of the services of counsel, is not necessary to sustain an allowance for counsel fees; the court may determine from its own experience, and from the facts and circumstances of the case as disclosed by the papers, what is a reasonable fee. *De Llamosas v. De Llamosas*, 62 N. Y. 618, dismissing appeal from 2 Hun, 380. See *Galusha v. Galusha*, 43 Hun, 181, reversed, however, 108 N. Y. 114, there holding, where the judgment dissolved the marriage and adjudged defendant give security to pay a certain sum annually as alimony, that to stay proceedings the defendant must comply with the terms of the judgment.

After an appeal has been taken from a judgment in favor of a wife in her action for divorce, an order cannot be made requiring

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the defendant to pay for services rendered by the plaintiff's attorney before the entry of judgment, nor can an order be made requiring defendant to pay an amount for expenses to which she may be subjected on the appeal, the power of the court to make such allowance being confined to the pendency of the action. *Winton v. Winton*, 31 Hun, 290, reversing 12 Abb. N. C. 259, and overruling *Anonymous*, 15 Abb. (N. S.) 307. See *Donnelly v. Donnelly*, 63 How. 81, and following *Kamp v. Kamp*, 59 N. Y. 212; followed, *Fagan v. Fagan*, 39 Hun, 531. In making an allowance for counsel fees in action for divorce, an allowance for two counsel ought not to be made unless it is shown that two counsel are necessary to protect the rights of the parties. *Uhlman v. Uhlman*, 51 Super. Ct. 361. The wife should be granted a counsel fee when her own statement makes out a *prima facie* case, and her income is not sufficient to support her and defray the expenses of the suit. *Brozenc v. Brozenc*, 9 Civ. Pro. R. 180, citing *Douglas v. Douglas*, 13 Abb. (N. S.) 291. Where the facts were in issue, and the case sent to a referee to determine as to alimony, and the plaintiff had no means, a counsel fee was allowed. *Brennan v. Brennan*, 19 Week. Dig. 342.

Where a sum was granted as counsel fees, defendant has no right to insist that a portion of it shall be applied to payment of the witness fees, as the allowance belongs to plaintiff's attorney. *Pountney v. Pountney*, 32 St. Rep. 335, 10 Supp. 192. Counsel fees will not be allowed a plaintiff who, five years after she has procured a decree of divorce in another State, brings another action for divorce against the same man, alleging that the judgment in the former action is void. *Ober v. Ober*, 7 Supp. 843. An extra allowance to counsel of a wife cannot be granted after the trial and determination of the action unless it appears that an appeal is to be taken or further expense is necessary to maintain her rights under the judgment. *Atherton v. Atherton*, 82 Hun, 179, 31 Supp. 977, 64 St. Rep. 798.

The amount of alimony depends upon the circumstances of each case, as the rank and condition of the parties, the fortune of the husband, his conduct toward his wife. *Burr v. Burr*, 10 Paige, 20. The amount of alimony should be fixed with reference to the husband's property and income, the claims of the children and others on him for support and education, and his ability to provide for the support of himself and his family by his own exertions. *Lawrence*

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v. *Lawrence*, 3 Paige, 267. Regard is to be had to the amount and income of the husband's estate, and other duties and burdens chargeable upon him, and the rank and condition of life of the wife. If he has ability to pay, she is to have such an allowance as will correspond with her social position, and at least maintain her in the style and condition that her husband's fortune would have reasonably justified her maintenance but for his infidelity, though it take half his income. After divorce for the husband's adultery the court may take into consideration against the wife her conduct after the judgment. But the legitimate subjects of inquiry are the proper measure of her expenditures, amount and income of his estate, and duties and burdens chargeable upon him; his conduct must be considered. *Forrest v. Forrest*, 25 N. Y. 501.

As to the proper proportion of the husband's estate to be allowed the wife as permanent alimony, see *Miller v. Miller*, 6 Johns. 91; *Peckford v. Peckford*, 1 Paige, 274; *Gilenger v. Gilenger*, 4 Lans. 473; *Collins v. Collins*, 10 Hun, 272; *Forrest v. Forrest*, 25 N. Y. 501; below, 3 Abb. 144; *Burr v. Burr*, 7 Hill, 207, affirming 10 Paige, 20; *Lynde v. Lynde*, 2 Barb. Ch. 72; *Leslie v. Leslie*, 6 Abb. (N. S.) 193; *Worden v. Worden*, 3 Edw. 387. It is held in *Burr v. Burr*, 7 Hill, 207, *supra*, that it is doubtful whether the court can order a gross sum to be paid the wife as alimony. Cited with approval, *Crane v. Cavana*, 62 Barb. 120. A decree was entered dissolving the marriage between plaintiff and defendant's testator, and allowing plaintiff alimony; subsequently the testator was discharged in bankruptcy; he afterwards died. *Held*, that whatever might have been defendant's liability while he lived, the only claim against his estate was for the debt created by the judgment, and that was discharged by the bankruptcy. *Beach v. Beach*, 29 Hun, 181. Alimony may be required to be secured by a lien on real estate, but the wife cannot, on obtaining alimony after judgment, be required to release dower. *Forrest v. Forrest*, 6 Duer, 102. Where a wife has husband's property in her hands, he will not be called upon to pay until that is exhausted. *Osgood v. Osgood*, 2 Paige, 621. Alimony is not affected by subsequent remarriage of the wife. *Shepherd v. Shepherd*, 1 Hun, 240, affirmed, 58 N. Y. 644; *Moore v. Moore*, 8 Abb. N. C. 171. One entitled to alimony payable in installments can release and discharge her claim therefor in full and in advance for a stipulated sum, and where such release is made without

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fraudulent practice or artifice, it is binding. *Smith v. Smith*, 43 Super. Ct. 140. If future alimony ought to be paid after judgment, a clause may be inserted in the judgment, or if reason exists for its payment, pending an appeal, a fresh application should be made. *Wood v. Wood*, 7 Lans. 204. In an action for a separation, counsel for the plaintiff has no lien upon alimony awarded the plaintiff or any part thereof; counsel must rely on the costs and counsel fee awarded for their compensation, and no claim to the alimony can inure to the benefit of the attorneys even though transferred to them by an assignment to them. *Branth v. Branth*, 19 Civ. Pro. R. 28.

SUB. 4. PRACTICE ON MOTION FOR ALIMONY AND COUNSEL FEES.

Formerly the application was by petition; *Longfellow v. Longfellow*, Clarke's Ch. 344; or upon affidavits showing the facts. *Monk v. Monk*, 7 Robt. 153; *Whitney v. Whitney*, 22 How. 175. It is held in the latter case that petition is not necessary, but that the application may be upon motion and affidavits. This seems more in accordance with the practice under the Code, while both cases hold that the statement of facts must be full and specific, and show a reasonable expectation that plaintiff will succeed; and if the wife is defendant, the defence should be disclosed by the answer. *Osgood v. Osgood*, 2 Paige, 621. It would seem to be good practice to move upon the pleadings and accompanying affidavits. The marriage relation should be shown to exist by the moving papers. *Brinkley v. Brinkley*, 50 N. Y. 184. A reference is not necessary where the facts appear sufficiently. *Hammond v. Hammond*, Clarke, 151.

If the facts stated in the complaint for limited divorce are clearly not sufficient, if true, to constitute a cause of action, alimony cannot be granted. Threats of violence by a husband against his wife so as to induce a reasonable apprehension of bodily injury, and charges of infidelity, made in bad faith, and as auxiliary to an aggravation of the threatened violence, are sufficient to constitute cruel and inhuman treatment within the meaning of the statute; and where such reasonable cause is shown, based on the complaint and a verified petition, though the allegations are denied or met by the answer and opposing affidavits, an allowance for alimony will not be reviewed by the Court of Appeals; the question of power in the court below is the only

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question reviewable. *Kennedy v. Kennedy*, 73 N. Y. 369. Where the defendant fails to pay alimony *pendente lite*, as directed by the court, his answer may be stricken out, and case proceed as if no answer had been put in. *Farnham v. Farnham*, 9 How. 231; *Brinkley v. Brinkley*, 47 N. Y. 40. And motion papers may be served on the attorney, and not upon the party. *Brinkley v. Brinkley*, 47 N. Y. 40. On a motion for alimony and counsel fees being granted by default, the court cannot stay the husband's proceedings, adjudge him in contempt, and refer the action where no relief was moved for in the papers. *Ohly v. Ohly*, 11 Week. Dig. 129.

Where the defendant in an action for divorce refused to pay alimony according to the order of the court, his answer was stricken out, unless the order was complied with within five days, and a reference directed to take proof of the facts stated in the complaint, *held*, the proper practice. *Walker v. Walker*, 82 N. Y. 260, affirming 20 Hun, 400, and collating cases. *Contra*, *McCrea v. McCrea*, 58 How. 220. See, also, *Quigley v. Quigley*, 45 Hun, 23.

Where the husband has notice of a motion compelling him to pay alimony, contests it, is defeated and subsequently leaves the State, he fails to comply with the order and is in contempt of court although the order may not have been served on him. The court has power to strike out his answer but has no power to strike out his notice of appearance, as he is entitled to appear in all proceedings in the action. *Knott v. Knott*, 6 App. Div. 589, citing *Quigley v. Quigley*, 45 Hun, 24, *Brisbane v. Brisbane*, 5 Civ. Pro. R. 352, *Walker v. Walker*, 82 N. Y. 261.

The education and support of the children of the marriage, in actions *a vinculo* and *a mensa et thoro* respectively is provided for by §§ 1759 and 1766, in substantially the same language as this section, and both those sections refer to the final judgment. Where a wife is divorced on the ground of her husband's adultery, her right to alimony is perfect and absolute. *Forrest v. Forrest*, 3 Bosw. 667. Alimony may be allowed in such cases, if the circumstances render it proper. *Graves v. Graves*, 2 Paige, 62. The allowance of alimony is an act of judicial discretion, which is not reviewable on appeal. *Gilenger v. Gilenger*, 4 Lans. 473; *Forrest v. Forrest*, 25 N. Y. 501. After verdict in favor of the wife, the husband is entitled to a hearing

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on the question of alimony. *Forrest v. Forrest*, 6 Duer, 102. A reference may be ordered to determine the proper amount. *Forrest v. Forrest*, 6 Duer, 102; *Gilenger v. Gilenger*, 4 Lans. 473; *Coolidge v. Coolidge*, 1 Barb. Ch. 77; *Miller v. Miller*, 6 Johns. Ch. 91. The better course is to direct a reference, yet a decree of divorce will not be reversed on appeal because it orders the payment of a specified sum without a reference. *Hoffman v. Hoffman*, 55 Barb. 269. Where a suit is commenced by summons, and the defendant does not appear, the court may award alimony if demanded in the application. *Park v. Park*, 18 Hun, 466, affirmed, 80 N. Y. 156. Pending proceedings for divorce, the wife cannot make a binding agreement as to the amount of alimony. *Daggett v. Daggett*, 5 Paige, 509.

Petition for Alimony and Counsel Fees.

SUPREME COURT—ULSTER COUNTY.

ANNA P. BEREAN

agst.

RUDOLPH K. BEREAN.

To the Supreme Court:

The petition of Anna P. Berean, the plaintiff above named, respectfully shows:

First. That she has brought this action against the defendant, her husband, for a limited divorce or judgment of separation between them, upon the ground of cruel and inhuman treatment, and of such conduct, on the part of the defendant, toward the plaintiff as renders it unsafe and improper for her to cohabit with him, as more fully appears by the complaint hereto annexed.

Second. That the action has been actually commenced by the service on defendant, on the 23d day of November, 1887, of the summons and complaint; that she will be able to substantiate all the allegations of the complaint by proof on the trial, and that she has a good cause of action thereon, as she is advised by her counsel, Carrol Whitaker, who resides at Saugerties, N. Y., and as she verily believes.

Third. That since said marriage the defendant has treated the plaintiff in a cruel and inhuman manner, and since the year 1872 he has repeatedly committed acts of cruelty and violence upon plaintiff and her children, as will more fully appear by the allegations contained in the verified complaint, a copy of which was served on the defendant herein on the 23d day of November, 1887.

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Fourth. That your petitioner is wholly destitute of the means of supporting herself or her children pending this action, or of carrying on the action and defraying the costs and expenses attending the same.

Fifth. That the defendant herein has real estate of the value of \$15,000, and personal estate of the value of \$20,000, as deponent is informed and believes, which is amply sufficient to enable him to advance therefrom to your petitioner such sums as may be necessary for the above-mentioned purposes; that your petitioner is informed and believes that the defendant is engaged in the mercantile business at Denning as a dry goods merchant, and that he has, or claims to have, a large trade and business in connection therewith, and that he has a large annual income therefrom; that the issue of the marriage of the parties hereto, now living with plaintiff, is three children, viz.: James Berean, aged thirteen years; Clarence W. Berean, aged eleven years, and Benjamin H. Berean, aged ten years; and plaintiff alleges that defendant is an unfit and improper person to have the care, custody, training and education of said children.

Sixth. Your petitioner, therefore, prays that the said defendant may, by an order of this court, be required to pay to your petitioner a reasonable sum for her support and maintenance, and for the support and maintenance of her children, during the pendency of this action, and such sums as may be necessary to enable your petitioner to carry on this action and to defray the necessary costs and expenses thereof, and for such other and further order as may be just.

ANNA P. BEREAN.

Precedent for Order Granting Alimony and Counsel Fees Pendente Lite.

At a Special Term of the Supreme Court held in and for the county of New York at the chambers of said court in the county court house in the city of New York, on the 8th day of December, 1891.

Present — Hon. George L. Ingraham, *Justice*.

ELIZABETH MERCER, PLAINTIFF <i>agst.</i> WILLIAM STUART MERCER, DEFEND- ANT.	} 73 Hun, 192.
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A motion for alimony *pendente lite* and for counsel fees coming on to be heard in this action on the summons and complaint herein, and upon proof of due service of the same upon the defendant William Stuart Mercer and the notice of said motion and proof of service thereof, and the affidavit of Rose Hopkins, verified on the 27th day of November, 1891 (here recite other papers read in support

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and in opposition to the motion), and after hearing F. De Lysle Smith, of counsel for the plaintiff, in support of said motion and Charles M. Berrian, of counsel for the defendant, in opposition thereto, and due deliberation having been had thereon,

Now, after reading and filing the said notice of motion and all the said above-mentioned papers and on motion of F. De Lysle Smith, attorney for plaintiff, it is hereby ordered that the defendant, William Stuart Mercer, pay and he is hereby ordered and directed to pay to Elizabeth Mercer, the plaintiff herein, ten dollars per week from the 15th day of December, 1891, as alimony and for expenses *pendente lite*, said payments to be made to F. De Lysle Smith, plaintiff's attorney, at said attorney's office, at No. 16 Cortland street, in the city of New York, and to be paid as follows: Ten dollars within two days after entry and service of a certified copy of this order upon the defendant and ten dollars upon each Tuesday of each week thereafter during the continuance of this action and until the entry of final judgment, herein, the said amounts to be for and to be applied to the maintenance, support and expenses of the said Elizabeth Mercer, said plaintiff; and it is hereby further ordered that the said defendant also pay to said F. De Lysle Smith, attorney for the plaintiff herein, ten days from the entry and service of a copy of this order upon the said defendant, \$50 as counsel fee.

G. L. 1.,
Justice Sup. Ct.

Precedent for Order Allowing Alimony and Counsel Fee.

At a Special Term of the Supreme Court held in and for the county of Kings at the court house in the city of Brooklyn, on the 16th day of January, 1894.

Present — Hon. Edgar M. Cullen, *Justice*.

ELIZABETH A. GRAY

agst.

JAMES C. GRAY.

143 N. Y. 354.

On reading the summons, complaint, answer and demurrer herein and on reading and filing notice of motion for this order, with proof of due service thereof on Baldwin & Boston, defendant's attorneys, and the petition of plaintiff, verified December 9th, 1893, and the affidavit of Leroy C. Yeomans, thereto annexed, and the defendant's answer to said petition, verified December 16, 1893, and the affidavits thereto annexed of Victor O. Strobel, Isaac Brokaw, Robert C. Fulton and John J. Daly, and the affidavits of Elizabeth A. Gray, Maggie Frawley and Matilda C. Alloway, and the papers thereto annexed, and the affidavit of James C. Gray, and after hearing Frederick H. Mann, of counsel for plaintiff, in support of the motion, and Charles A. Boston, of counsel for defendant, in opposition thereto,

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On motion of Mann & Mann, plaintiff's attorneys, it is ordered,

1. That defendant pay to Mann & Mann, plaintiff's attorneys, the sum of \$250 counsel fees, within ten days after the service of a certified copy of this order on defendant's attorneys.

2. That defendant pay to plaintiff the sum of one hundred dollars per month for her support and the education and support of the children of the marriage during the pendency of this action and from the commencement thereof, to wit, November 10th, 1883, and make such payments as follows, to wit: For the two months ending January 10th, 1894, within five days after the service of a certified copy of this order on defendant's attorneys, and thereafter on the 25th day of each and every month beginning on the 25th day of January, 1894.

3. That defendant make each and all of the payments above ordered at the office of Mann & Mann, plaintiff's attorneys, 56 Wall street, New York city, between the hours of ten in the morning and three in the afternoon, and if any of the days so above fixed for payment shall fall on a Sunday or other holiday, then said payment shall be made on the next succeeding secular day.

E. M. C.

SUB. 5. ALIMONY IN FINAL JUDGMENT.

The purpose and intent of the allowance of alimony is fully discussed in *Romaine v. Chauncey*, 129 N. Y. 566, where it is held that alimony is an allowance for support and maintenance, having no other purpose, to provide for no other object; that it respects the provision for food and clothing and the habitation or the necessary support of the wife after the marriage bond has been severed, and when awarded it is not so much in the nature of a payment of a debt as in that of the performance of a duty; the divorce, with its incidental allowance and alimony, simply continues the duty of the husband beyond the decree, and compels him to perform it, but does not change its nature. The court has no power, subsequent to granting of the decree, to grant alimony by reason of circumstances thereafter arising. There is no jurisdiction in the court. *Kamp v. Kamp*, 59 N. Y. 212. But an allowance may be made for the care and education of the children of the marriage. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.

The court has no power to grant alimony to the wife after final decree in an action by her for a separation. *Anderson v. Cullen*, 8 Supp. 643. Since 1880, after judgment in a suit for absolute divorce, a judgment cannot be modified nor order made to provide for children otherwise than as provided therein. *Chamberlain v. Chamberlain*, 63 Hun, 96, 43 St. Rep. 502, 17 Supp. 578; *Sandford v. Sandford*, 42 St. Rep. 1, 17 Supp. 181, distinguishing

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Erkenbrach v. Erkenbrach, 96 N. Y. 456; *Washburn v. Cattlin*, 97 N. Y. 623, which were begun before the repeal. But a judgment of divorce providing that if plaintiff survives defendant or their circumstances materially change, an application may be made at the foot of the judgment for a modification as to the allowance for support, is not such a final judgment as to prevent a subsequent increase of alimony. *Stahl v. Stahl*, 36 St. Rep. 228, 12 Supp. 854. After judgment for separation, the court cannot grant alimony or change that given, though the judgment provides that in a specified event application might be made on the foot of it for a modification of the judgment touching the support of the plaintiff. The court has only the powers given by statute and no others. *Cullen v. Cullen*, 55 Supr. 346; S. C. 18 St. Rep. 381.

Where a judgment of divorce which did not award alimony did not determine that plaintiff was not entitled to it, but only that a previous agreement for separation fixed the amount, it was held that plaintiff, on proof of facts entitling her to a cancellation of the agreement, could move for alimony without opening the judgment of divorce, and was not required to restore what she had received under the agreement, as a condition of obtaining relief. *Galusha v. Galusha*, 138 N. Y. 272, 52 St. Rep. 359. Agreement for separation and maintenance held binding as to support of wife after divorce. *Galusha v. Galusha*, 116 N. Y. 635; *Clark v. Fosdick*, 118 N. Y. 7. It is settled in this State that an agreement on the part of husband and wife to live apart is not void on the ground of public policy. *Duryea v. Blicen*, 122 N. Y. 567.

Where a foreign judgment of divorce awards the custody of a child to the mother, but makes no allowance for its support and maintenance, it will be presumed the wife's claim for such allowance was decided adversely to her, and such judgment is a bar to an action brought in this State for such an allowance. *Rich v. Rich*, 88 Hun, 566, 34 Supp. 854, 68 St. Rep. 823. The jurisdiction of the courts of another State to render a judgment for costs and alimony in an action for divorce, may be inquired into by the courts of this State; as to alimony and costs it is a proceeding *in personam*. *Rigney v. Rigney*, 127 N. Y. 408, reversing 53 Hun, 457.

The palpable purpose of § 1769 is to enable the wife to prose

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cute her suit and save her from starvation or beggary during the process, and, therefore, no antecedent creditor will be allowed to take the alimony by virtue of a judgment. *Romaine v. Chauncey*, 129 N. Y. 566, 39 St. Rep. 480. Obligation to pay alimony during plaintiff's life ceases at defendant's death. *Field v. Field*, 15 Abb. N. C. 434.

ARTICLE VI.

PROVISIONS FOR CUSTODY OF CHILDREN IN JUDGMENT.

§ 1771.

§ 1771. [Am'd. 1895.] **Custody and maintenance of children, and support of plaintiff.**

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment, or by one or more orders, made from time to time, before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice, as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

The question as to which party is entitled to the custody of a minor child is discussed in *Fiero* on Special Proceedings, title *Habeas Corpus*, where authorities are collated. Only a few of the leading authorities are, therefore, cited here. One of the earliest decisions is in the *Merccin Case*, 3 Hill, 399, 8 Paige, 47, 25 Wend. 64, examined in *People v. Brooks*, 35 Barb. 85. See *Paulding v. Wilson*, 13 Johns. 192; *In re Paulding*, 15 How. 167; *People v. Olmstead*, 27 Barb. 9; *People v. Humphrey*, 24 Barb. 521; *Burritt v. Burritt*, 29 Barb. 124; *Bedell v. Bedell*, 1 Johns. Ch. 604; *Cook v. Cook*, 1 Barb. Ch. 639; *Collins v. Collins*, 2 Paige, 9; *Johnson v. Erbert*, 17 Abb. 399; *Barrere v. Barrere*, 4 Johns. Ch. 187. Appeal to the Court of Appeals dismissed on the ground that the courts below, in view of all the existing facts relating to the welfare and interests of the infants, exercised their discretion in awarding to the mother the custody of the children. *Allen v. Allen*, 105 N. Y. 628, affirming 2 St. Rep. 199. In an

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action brought by a married woman for a divorce, the court has the power to award the custody of the child to the plaintiff, and its discretion cannot be reviewed by the Court of Appeals. *Price v. Price*, 55 N. Y. 656. Where plaintiff fails in an action for separation, the court has no power to give judgment awarding the custody of the children of the marriage to the plaintiff and make provision for their support out of the property of the husband. Nor is such decree justified by the power of the court to control the custody of the children pending the action. This only provides for their provisional custody and for awarding their custody when a decree shall be granted. The equity powers of the court cannot be invoked to sustain such a judgment. It seems that where a husband and wife live separate without being divorced, the remedy of the wife seeking the custody of the minor children is by *habeas corpus*. *Davis v. Davis*, 75 N. Y. 221. In *Waring v. Waring*, 100 N. Y. 570, an action for separation, brought by the husband, it is said, Earl, J., all concurring: "As to the children, the court below, on all the facts in the case, exercised its discretion in awarding their custody to the husband until the further order of the court. In disposing of the custody of minor children the court regards mainly the welfare of the children. It is open to her to satisfy the court, if she can, on any future application, that the welfare of the two younger children will be best promoted by placing them in her custody. Until she can do so the judgment must stand as rendered."

It is said in note to *People ex rel. Johnson, v. Erbert*, 17 Abb. 399, that provision in a judgment of divorce, awarding the custody of the children to the wife, ceases on her death, and the father may then take them. Where, pending divorce, the custody of children has been given to one parent and the other given a right to visit them, security may be required that the children will not be removed beyond the jurisdiction of the court. *People ex rel. v. Paulding*, 15 How. 67. After a divorce granted to the husband for the wife's adultery and the awarding of the custody of the children to him, the court cannot, by a modification of the judgment, or otherwise, order that the wife may be allowed to see the child. *Crimmins v. Crimmins*, 28 Hun, 200. See *Catlin v. Catlin*, 31 Hun, 632, affirmed, 97 N. Y. 623, and language of last clause of section.

In *Nichols v. Nichols*, 4 Duer, 642, it is said that the custody

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of the children is to be enforced by attachment or *habeas corpus*; not by order to sheriff to take them and deliver them to the party entitled. The codifiers say, as to this section, that it has been remodeled by extending its provisions to an action brought by a husband and so as to make the decision appealable, and that the provisions are confined to orders before judgment, in accordance with *Kamp v. Kamp*, 59 N. Y. 212. The decree may be changed or modified at any time before or after final judgment as to the sum awarded for the support and maintenance of the children of the marriage. *Wells v. Wells*, 10 St. Rep. 248. Where the husband obtains a divorce for the wife's adultery, he is entitled to the custody of the children unless their good clearly requires otherwise. *Uhlman v. Uhlman*, 17 Abb. N. C. 236.

Where by stipulation of parties in an action for divorce, a daughter is not to be assigned to the custody or company of her mother pending suit, it is error of the court, upon refusal of the father's attorneys to act with the mother's attorneys, in selecting a place of residence for her, to direct that she be maintained at her father's expense at the hotel where her mother boards. *Beadleston v. Beadleston*, 2 Supp. 814. Where a husband is, on decree in divorce, entitled to custody of children, he cannot arrest the mother for refusal to voluntarily give up the child. *Monjo v. Monjo*, 53 Hun, 145.

Where husband and wife were living separately and on trial before a referee the husband was held entitled to a divorce, the terms of the separation were that the wife should have the custody of the child; *held*, a reference to take proof as to the care and custody of the child should not be made to the referee who decided the divorce suit. *Petition of Bliss*, 23 Week. Dig. 383. See precedents for judgments under Divorce and Separation for proper provisions for custody and maintenance of children.

ARTICLE VII.

JUDGMENT FOR ALIMONY, HOW ENFORCED. §§ 1772, 1773.

§ 1772. Support, maintenance, etc. of wife and children. Sequestration.

Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the

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payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order made as prescribed in section 1769 of this act; the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money, specified in this section, as justice requires.

§ 1773. Id.; when enforced by punishment for contempt.

Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in title third of chapter seventeenth of this act. Such an order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

It was formerly held that the court could not sequester a husband's estate to pay an allowance ordered by final judgment until it had made an order for him to give a bond with surety, to pay the allowance, and the husband and surety have failed to fulfill the condition. *Forrest v. Forrest*, 9 Bosw. 686. And the same rule is held in *Davis v. Davis*, 1 Hun, 444. Where a receiver is appointed, under the provisions of the statute, authorizing sequestration for non-payment of alimony, such receiver acquires no title to the real estate, but simply is entitled to possession as against defendant and all claiming under him; and so long as his rights are unquestioned and there is no interference therewith, either actual or threatened, he has no concern with the title and cannot maintain an action to try the validity of the transfers thereof by defendant. It seems that any proceedings to compel the application of the husband's real estate, or in any way to compel the payment of the alimony from the property, should be brought by the wife. *Foster v. Townshend*, 68 N. Y. 203. Where the complaint alleged that in an action for separation, brought by the wife against her husband, judgment was entered in her favor, by which he was directed to pay certain sums of money to her and to give security therefor; that he had failed to comply

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therewith; that he had left the State to avoid the personal service of a summons, and had transferred his real and personal property, without consideration, to his daughter, with intent to defeat the judgment to be entered in such action; that the daughter received the same with knowledge of such intent; that the plaintiff had been appointed by the court sequestrator or receiver of the personal property and of the rents and profits of the real estate; that he was unable to obtain any of the rents and profits by reason of such conveyance and the refusal of the tenants to attorn to him; and that he was directed by the court to bring an action to set aside such conveyance as fraudulent and void as against the plaintiff in the first action; *held*, that a demurrer to the complaint on the ground that the plaintiff had not legal capacity to sue and that the complaint did not state facts sufficient to constitute a cause of action, was properly overruled on the authority of *Foster v. Townshend*, 68 N. Y. 203, *supra*, and notes to that case as reported, 2 Abb. N. C. 29; *Donnelly v. West*, 17 Hun, 556, reported on re-hearing, 66 How. 435. If the husband does not pay the money which the judgment of the court awards for the support of the wife, she may resort to the remedies provided by these sections, but in so doing she cannot look to her former husband to advance the means for carrying on the proceedings to enforce the judgment. *McQuien v. McQuien*, 61 How. 280. The court may make an order appointing a receiver and sequestrating defendant's property even though no direction to furnish security for the payment of alimony has been made in the judgment, and defendant had not refused to furnish such security. *Percival v. Percival*, 14 St. Rep. 255.

Section 1773 is said by the codifiers to be new and added for the purpose of settling the question whether non-payment of costs and alimony, in an action for divorce, can be punished as a contempt. The case of *Lausing v. Lausing*, 4 Lans. 377, holding the contrary, is said — *Boucicault v. Boucicault*, 21 Hun, 431 — to be at least shaken by *Park v. Park*, 80 N. Y. 156, and was questioned in *Strobridge v. Strobridge*, 21 Hun, 288; and *Gane v. Gane*, 45 Super. Ct. 355; s. c. 46 Super. Ct. 218, and *Baker v. Baker*, 23 Hun, 360, are distinguished in *Ryckman v. Ryckman*, 34 Hun, 235, as decided before the section. *Park v. Park*, 80 N. Y. 156, *supra*, was decided before the enactment of the last fourteen chapters of the Code, but holds that, upon the return of

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an attachment against a defendant, for an alleged contempt in disobeying a provision which required him to pay alimony and give security for the payment thereof, and when, upon motion to vacate the attachment, the court adjudged him to be in contempt and adjudged him to pay a fine, to give security for a specified amount for future alimony, and to stand committed until compliance with the order, the whole matter was before the court and it had jurisdiction to grant such relief. Also *held*, that plaintiff was not estopped from enforcing, in this manner, payment of alimony by the fact that the judgment authorized an execution to issue. The court holds, per Miller, J.: "The position that costs and alimony cannot be enforced by proceedings for contempt is sufficiently answered in the opinion of the General Term, with which we concur, and does not require discussion." In *Strobridge v. Strobridge*, 21 Hun, 288, decided June 1880, it was held that where a defendant, in an action brought against him by his wife for a limited divorce, fails to comply with the terms of an order requiring him to pay a certain sum of money to meet the expense of the suit, he is guilty of contempt for which the court may issue a precept committing him to jail. Where the defendant refuses to comply with an order requiring the payment of alimony, the court may act directly, by proceedings to punish for contempt, if any evidence is offered from which it presumptively and satisfactorily appears that payment cannot be enforced by resorting to security, or by means of sequestration where no security has been given. An affidavit, on information and belief, that defendant has no real estate or personal property unless he has accumulated his earnings; that deponent believes such earnings cannot be reached, and that defendant cannot give security, is sufficient to warrant an order to show cause why defendant should not be punished for contempt in not paying alimony. *Rahl v. Rahl*, 14 Week. Dig. 560. But in *Isaacs v. Isaacs*, 61 How. 369 (1881), it was held that this section was intended to change the law as it existed, and prohibit the commitment of the husband, for failure to pay alimony, until it was apparent it could not be collected otherwise.

In *Ryer v. Ryer*, 33 Hun, 116 (1884), the defendant was committed to prison for a contempt of court, in failing to pay alimony awarded and directed to be paid by a judgment for divorce recovered against him by his wife, who was plaintiff, and moved

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to be discharged from imprisonment. The order did not recite or adjudge that payment of the alimony could not be enforced by means of security or the sequestration of his property. *Held*, that neither §§ 1772 nor 1773 of the Code of Civil Procedure required such an adjudication to be stated or recited in the order; that as the order of commitment was made upon notice, and after hearing the attorney for defendant, and as no appeal has been taken therefrom, it would not be presumed, when attacked collaterally, that any defect existed in the proof upon which it was made. The defendant sought to be discharged on the ground that he was unable to pay the alimony as directed by the judgment under the provisions of § 2286. *Held*, that as his inability seemed to have been caused by his having married in another State a second wife, in direct violation of the provisions of the judgment of divorce, and was, therefore, voluntarily and intentionally created, it formed no ground for his discharge. It is further held that neither *Isaacs v. Isaacs*, 61 How. 369, nor *Rahl v. Rahl*, 14 Week. Dig. 560, sustain the objection taken to the order. The burden is upon the husband in proceedings for non-payment of alimony, to establish his poverty and show that he cannot earn enough to support his family. *Holtham v. Holtham*, 6 Misc. 266, 58 St. Rep. 130, 26 Supp. 762.

Where a wife has procured a judgment for alimony and divorce, and the husband thereafter fails to pay alimony as required by the terms of said judgment, the court may, under §§ 1772 and 1773, punish him as for a contempt for such failure, and the right to so punish him is not affected by the fact that the judgment was recovered before the section took effect. As to this point, see closing sentence of opinion of Ruger, Ch. J., in *Erkenbrack v. Erkenbrack*, 96 N. Y. 466. Nor can the application be answered by affidavits showing that defendant is unable to make the payments. To procure relief upon this ground the defendant should move to be relieved from imprisonment under § 2286. *Ryckman v. Ryckman*, 34 Hun, 234 (1884); affirmed, without opinion, 98 N. Y. 639. In *Matter of Ryckman*, 39 Hun, 646, the husband availed himself of the provisions of § 2286, and it appearing he had no property he was discharged, but subject to re-arrest if he resumed his relations with another woman, with whom he was living in adultery.

Where a plaintiff had been ordered to pay temporary alimony

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he was held liable to proceedings for contempt on non-payment, and this section applied, but in such case the party must be brought in by order to show cause, not by notice of motion, nor can he be adjudged guilty of contempt for failing to comply with the directions of the decree until a copy thereof has been served upon him. To punish a party for contempt in a civil proceeding his conduct must be such as to defeat, impair, impede or prejudice a right or remedy of the party affected by it, and that fact must be ascertained and adjudged by the court directing the punishment which is to be imposed. *Sandford v. Sandford*, 40 Hun, 540. In *Sandford v. Sandford*, 44 Hun, 563, it is held that it should appear by the moving papers whether the party sought to be put in contempt for non-payment of alimony has any real or personal property, and that payment cannot be obtained by sequestration. It is said that the Code contemplates the appropriation of the property of the party first, and if that be not sufficient to pay the amount, then to punish by mandatory process. Where one is already in jail for a contempt in omitting to pay the sum due for alimony, and has no property which can be reached, and is unable to give security, a second order of a similar character will not be granted. *Mendel v. Mendel*, 6 St. Rep. 511; *Clark v. Clark*, 1 St. Rep. 287.

Payment of referee's fees on a reference as to alimony and counsel fees, *pendente lite*, can be enforced by process of contempt, and the order to show cause may be served on the attorney of the party, but the order must adjudicate that the accused has committed the offense charged, and that it is calculated to impair, etc., the remedy of the moving party. *Mahon v. Mahon*, 5 Civ. Pro. R. 58. Where defendant does not comply with the order as to alimony his answer may be stricken out. *Quigley v. Quigley*, 9 St. Rep. 486. The remedy given by this section does not supersede the power of the court to strike out the answer of a defendant, who is in contempt for disobeying an order requiring him to pay alimony and counsel fees. *Brisbane v. Brisbane*, 5 Civ. Pro. R. 352. See *Lash v. Lash*, 4 Law Bull. 20. It is held in *Matter of Clark*, 20 Hun, 551, appeal dismissed, 81 N. Y. 638, that one arrested for contempt in failing to pay counsel fees and alimony is not entitled to jail liberties. It is held in *Jacquin v. Jacquin*, 7 Civ. Pro. R. 327, that the court has no power, under this section, to punish a husband for contempt for non-

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payment of costs and counsel fees which he was directed to pay by the final judgment in an action for separation; such costs and counsel fee should be collected by execution; such remedy is limited to collection of alimony. As to proceedings for contempt and the forms of method of procedure, see Fiero on Special Proceedings, title "Contempt."

An order committing a person for contempt in not paying alimony must contain an adjudication that the refusal to do so is calculated to or did actually defeat, impair or prejudice the rights of the party in whose favor it has been ordered, and must show that payment cannot be enforced by execution, sequestration or resort to security. *Whitney v. Whitney*, 33 St. Rep. 704, 19 Civ. Pro. 265, citing *Mahon v. Mahon*, 50 Supr. 92; *Sweeney v. Shupe*, 40 Hun, 41; *Sandford v. Sandford*, 40 Hun, 540, 2 St. Rep. 133; *Cockefair v. Cockefair*, 7 Supp. 170; *Sandford v. Sandford*, 44 Hun, 563, 9 St. Rep. 46.

Where the defendant in an action for separation, knowing plaintiff's attorney was entitled to costs and counsel fee, secretly settled with her and procured a satisfaction piece, and she thereafter died, her attorneys can subsequently collect the amount of such costs and counsel fee under § 779, as if the plaintiff were alive and the payment thereof may in a proper case be enforced in a proceeding to punish for contempt by a fine imposed which would cover them. *Branth v. Branth*, 19 Civ. Pro. R. 28.

The right to enforce by proceedings as for a contempt, compliance with an order made during the pendency of an action for divorce, requiring the husband to pay a certain sum as counsel fee to enable the wife to carry on the action under § 1769, is not lost by reason of the fact that the order improperly provided that such allowance might be included in the final judgment in the action to be enforced by execution, and it was thereafter inserted in the judgment. *Mercer v. Mercer*, 73 Hun, 192.

It is held in *Sandford v. Sandford*, 44 Hun, 563, s. c. 9 St. Rep. 46, 12 Civ. Pro. R. 183, that it must affirmatively appear that defendant has no property, by sequestration of which payment could be enforced, before contempt proceedings will lie. See, also, *Whitney v. Whitney*, 19 Civ. Pro. R. 265; see, however, *In re Sims*, 11 Supp. 211.

The claim of an attorney for compensation for his services as attorney for plaintiff in an action for separation cannot be en-

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forced by contempt proceedings where the parties have settled the action. *Weill v. Weill*, 10 Supp. 627, s. c. 18 Civ. Pro. R. 241.

It seems service on the attorney for a party is sufficient to obtain jurisdiction to punish him for contempt. *Winton v. Livey*, 16 Civ. Pro. R. 348; *Zimmerman v. Zimmerman*, 14 Supp. 444.

It is not necessary that there be served with final order adjudging party in contempt, the affidavits and proofs recited therein. *People ex rel. v. Grant*, 13 Civ. Pro. R. 183. Costs awarded by a judgment in matrimonial actions can be enforced by contempt proceedings if it appear presumptively that payment cannot be enforced by security or by sequestration or execution. *Cockefair v. Cockefair*, 23 Abb. N. C. 219. An *ex-parte* application for process on a decree in divorce will not be granted; there must be an order to show cause. *Rudolph v. Rudolph*, 12 Supp. 81.

An action may be maintained in this State to recover installments of alimony awarded by a foreign judgment of divorce as they fall due, but there is no principle of equity or comity by which the defendant's property can be sequestered or he can be compelled to give security in this State for future alimony awarded by a foreign judgment. *Wood v. Wood*, 31 Abb. N. C. 235, 7 Misc. 579.

Where a husband failed to pay alimony which he had been decreed to pay, and his property was sequestered and a receiver appointed, it was held that the receiver took no title to income which accrued after his appointment, and if it did not appear that there was any on hand when he was appointed, in no event could the receiver take title to the income present or future, such right, if it existed, being the personal right of the wife growing out of her action for a divorce, and that a receiver did not represent her in the sequestration proceedings in respect to such income, and that any relief which the wife could obtain must be by proceeding in the divorce suit. *Wetmore v. Wetmore*, 67 Hun. 9. The proper proceeding seems to have been taken, and is reported 79 Hun. 268, where it was held that the right of a wife and children to support out of the income of a trust fund, of which the husband and wife were beneficiaries, could not be lost because of the misconduct of the husband, which had broken up the family and driven his wife and children to living abroad from him, and that a decree directing the payment of the income to and for the support of the wife and children was proper; and as it appeared that the husband needed none of the income and the wife and children

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needed it all and more, an order to that effect was properly made. On appeal to the Court of Appeals it was held that the effect of a judgment in an action for divorce awarding alimony to the wife, to be paid by the husband, is to make her a creditor of the husband, and after having exhausted the remedy given by the Code to obtain payment of alimony, she may through an action in equity subject the surplus income over what is required for the husband's support, of a testamentary trust created for the husband's benefit without any valid direction for the accumulation of income, to payment of her alimony, both past due and to accrue. *Wetmore v. Wetmore*, 149 N. Y. 520, modifying 79 Hun, 268.

Where an allowance for alimony is made the wife, a trustee required by the will of his testator to pay over annually to the husband the income of a trust estate, may be ordered by the court to pay to the wife out of such income the alimony awarded her. *Thompson v. Thompson*, 52 Hun, 456. Costs and counsel fee awarded the wife by final judgment in an action for divorce cannot be enforced by proceedings to punish for contempt. *Branth v. Branth*, 20 Civ. Pro. R. 33.

Precedent for Notice on Application for Appointment of Receiver.

SUPREME COURT — NEW YORK COUNTY.

JULIA A. PERCIVAL, PLAINTIFF,

agst.

EDWARD S. PERCIVAL, DEFENDANT.

124 N. Y. 637.

Sir:

Take notice that on the annexed affidavit and the pleadings herein, an application will be made to the court at chambers thereof on the 4th day of April, 1887, on the call of the calendar, for a sequestration of the personal property and of the rents and profits of the real property of the defendant, Edward S. Percival, and for the appointment of a receiver thereof for the costs of this motion and for such other and further relief as may be meet in the premises.

New York, March 21st, 1887.

RAPHAEL J. MOSES, JR.,
Plaintiff's Attorney.

TO EDWARD P. WILDER, Esq.,
Defendant's Attorney.

Art. 7. Judgment for Alimony, how Enforced.

Precedent for Affidavit on Application for Appointment of Receiver.

SUPREME COURT.

JULIA A. PERCIVAL, PLAINTIFF,

agst.

EDWARD S. PERCIVAL, DEFENDANT.

124 N. Y. 637.

CITY AND COUNTY OF NEW YORK, ss. :

Julia A. Percival, being duly sworn says: I am the plaintiff in the above-entitled action; the defendant has not paid to me or for my use either the sum of \$300, awarded me by judgment herein for repayment of sums expended by me for my support and maintenance since the commencement of this action, or any part thereof, or any part of the further sum of \$250, awarded me by said decree for my counsel fees in addition to the costs of this action, or any part of \$161.94, the costs as taxed, nor has the defendant paid any part of \$350 a year alimony allowed me and required to be paid quarterly in advance from the 4th day of January, 1887.

That, as deponent is informed and believes, the defendant is possessed of choses in action or claims against George F. Gilman, Aaron Healy and others of the value of \$5,000 and upwards, and also an interest in certain real estate in the city of Brooklyn, being one-twentieth undivided part of the premises known as 265 Clinton street. That more than thirty days have elapsed since a copy of a decree in this action was served upon Edward P. Wilder, the attorney for the defendant herein.

(Jurat.)

JULIA A. PERCIVAL.

Precedent for Order Appointing Receiver.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of New York, at Chambers thereof in the County Court House, in the City of New York, on the 7th day of April, 1887.

Present — Hon. Charles Donohue, *Justice*.

JULIA A. PERCIVAL, PLAINTIFF,

agst.

EDWARD S. PERCIVAL, DEFENDANT.

124 N. Y. 637.

On reading and filing the affidavit of Julia A. Percival, verified on the 19th day of March, 1887, the pleadings and the decree entered

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herein on the 17th day of February, 1887, and on all the papers and proceedings herein, and proof of due service of notice of motion for a sequestration of the personal property, and of the rents and profits of the real property of the defendant, Edward S. Percival, and for the appointment of a receiver thereof on Edward P. Wilder, Esq., attorney for the defendant, and the said motion having duly come on to be heard, and after hearing Raphael J. Moses, Jr., attorney for the plaintiff in favor of the motion, and Edward P. Wilder, Esq., attorney for the defendant in opposition thereto, it is, on motion of Raphael J. Moses, Jr., attorney for plaintiff,

Ordered, that Charles Prime of New York, counselor at law, be and he is hereby appointed receiver of the personal property and of the rents and profits of the real property of the defendant Edward S. Percival, upon the said receiver executing, acknowledging and filing with the clerk of this court a bond in the usual form to the people in the penalty of \$500, with two sufficient sureties, conditioned for the faithful discharge of his duties as receiver.

Precedent for Affidavit to Obtain Payment of Moneys from Receiver.

NEW YORK SUPREME COURT.

JULIA A. PERCIVAL, PLAINTIFF,

agst.

EDWARD S. PERCIVAL, DEFENDANT.

124 N. Y. 637.

CITY AND COUNTY OF NEW YORK, ss. :

Raphael J. Moses, Jr., being duly sworn, says: I am plaintiff's attorney herein; judgment was rendered herein on the 4th day of January, 1887, for \$711.94, docketed as of February 17, 1887, and also for alimony, payable in advance at the rate of \$350 a year, payable quarterly as of the 27th day of February, and 1st of April, and afterward on the 7th of April, a further payment of \$250 to the plaintiff for counsel fees on the pending appeal herein was ordered; that no part of said sums have been paid and there was due thereon the 13th day of April, \$1,145.28; there is not time to give notice before the third Monday and the plaintiff is without means and dependent on this decree for support; that Charles Price has been duly appointed receiver of defendant and qualified as such, and has in his possession \$1,250 subject to the order of this court as per receipt hereto attached. A true copy. The appeal herein is now pending.

(Jurat.)

RAPHAEL J. MOSES, JR.

Art. 7. Judgment for Alimony, how Enforced.

Precedent for Order that Receiver Pay Over Moneys.

At a Special Term of this court, held at the City of New York, on April 19th, 1887.

Present — Hon. Charles Donohue, *Justice*.

JULIA A. PERCIVAL, PLAINTIFF,

agst.

EDWARD S. PERCIVAL, DEFENDANT.

124 N. Y. 637.

An order to show cause having been made herein on the 14th day of April, requiring the defendant Edward S. Percival and Charles Price, receiver herein, to show cause, if any they have, why an order should not be made directing Charles Price, as receiver aforesaid, to pay to Raphael J. Moses, Jr., as attorney for Julia A. Percival, plaintiff herein, the sum of \$1,145.28, due her on the 13th day of April, under previous orders and judgments in this action, together with \$10 costs of motion, and said motion having come on to be heard on the 18th day of April, Mr. Wilder appearing for the defendant Percival and filing the affidavit of the said Percival, verified April 16th, in opposition thereto, and Mr. Horne appearing for Charles Price, receiver herein, and filing the affidavit of Charles Price, verified the 18th day of April, 1887, and Mr. Moses appearing in behalf of the plaintiff and the counselors being duly heard, it is, on motion of Raphael J. Moses, Jr., attorney for plaintiff,

Ordered, that Charles Price, receiver, pay to Raphael J. Moses, Jr., as attorney for Julia A. Percival, \$1,156.23, and the same shall be in full satisfaction of the amounts awarded, with interest to date in this action, so far as the same are now payable, and that the receiver retain for his fees \$62.50 and \$212, for his disbursements, including counsel fees paid Mr. Horne.

Precedent for Order for Commitment for Contempt.

At a Special Term of the Supreme Court, held in and for the County of New York, at the County Court House in the City of New York, on the 13th day of January, 1892.

Present — Hon. George S. Barrett, *Justice*.

ELIZABETH MERCER, PLAINTIFF,

agst.

WILLIAM STUART MERCER, DEFENDANT.

73 Hun, 192.

A motion having been made to punish defendant herein as for a contempt for misconduct in failing to obey the certain order of this

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court entered herein on the 21st day of December, 1891, after reading the said order entered herein on the 21st day of December, 1891, and the papers upon which said order was granted filed herein on the said 21st day of December, 1891, and after reading and filing the order to show cause upon this motion, on affidavit of F. De Lysle Smith, verified on the 8th day of January, 1892, and the affidavit of Elizabeth Mercer, verified on the 7th day of January, 1892, in support of said motion, and the affidavit of William Stuart Mercer, verified on the 12th day of January, 1892, in opposition thereto, and after hearing F. De Lysle Smith, of counsel for plaintiff, in support of said motion, and Charles M. Berrian, counsel for defendant, in opposition thereto,

Now, on motion of F. DeLysle Smith, attorney for said plaintiff, it is hereby ordered, adjudged and determined:

1. That William Stuart Mercer, is guilty of a contempt of court in having willfully disobeyed said order made in this action and entered and filed herein on the said 21st day of December, 1891, ordering and directing him to pay to F. De Lysle Smith at his office, No. 18 Cortland street, in the city of New York, \$10 per week alimony *pendente lite* from the 15th day of December, 1891, the same to be applied to the maintenance, support and expenses of the plaintiff herein, and further ordering and directing him to pay to said F. De Lysle Smith, \$50 as counsel fees, and that he has entirely neglected, failed and refused to pay the said alimony and counsel fees, or any part thereof, as directed by said court.

2. That said misconduct of William Stuart Mercer was calculated and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff herein to her actual loss in the sum of \$90, being \$40 due as said alimony and \$50 counsel fee, besides the costs of this motion.

3. That the said William Stuart Mercer by his said misconduct is hereby fined the sum of \$100 to be paid to F. De Lysle Smith, the said attorney of said plaintiff, being such sum together with \$10 costs of this motion.

4. That said William Stuart Mercer be committed by the sheriff of the county of New York to the county jail in the city of New York, to be there detained in close custody until he shall pay said sum or until he shall be discharged according to law.

GEORGE C. BARRETT,
Justice Supreme Court.

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Precedent for Order of Commitment for Contempt.

At a Special Term of the Supreme Court held in and for the City and County of New York, at the County Court House, in the City of New York, on the 11th day of September, 1883.

Present — Hon. Charles Donohue, *Justice*.

VIRGINIA RYER, PLAINTIFF,

agst.

FRANK RYER, DEFENDANT.

33 Hun, 116.

This motion coming on to be heard upon an order to show cause and on reading and filing the affidavits of Virginia Ryer, Edward A. Rice, John S. C. Bailey and Frank Ryer, used on this motion, said order to show cause having heretofore issued out of this court against the defendant Frank Ryer for his contempt in violating the judgment and decree of divorce heretofore duly given by this court, bearing date the 19th day of February, 1883, and entered in the office of the clerk of the city and county of New York, March 1st, 1883, wherein plaintiff above named, Virginia Ryer, was plaintiff, and defendant above named, Frank Ryer, was defendant, dissolving the marriage contract between them on the ground of the adultery of the defendant Frank Ryer, in this, to wit, for failure to pay the sum of \$110 alimony due August 1st, 1883, and after hearing Baker, Bailey & Baker, the attorneys for the plaintiff, in favor of said motion, and H. M. Collier, Esq., attorney for defendant, in opposition thereto,

It is ordered and adjudged, that the said defendant Frank Ryer stand committed to the common jail of the city and county of New York, charged upon said contempt until the said sum of \$110 final alimony, together with costs and expenses of this proceeding, to wit, the sum of one hundred and thirty-one $\frac{36}{100}$ dollars, shall be fully paid, unless he shall sooner be discharged by this court, and that a warrant issue to carry this order into effect.

C. DONOHUE,
Justice.

Precedent for Commitment.

The People of the State of New York, to the sheriff of the city and county of New York, greeting :

Whereas, on the 11th day of September, 1883, by an order made by the Supreme Court, at a Special Term thereof, held at the Court House in the city and county of New York, on the 11th day of September, 1883, in an action herein, wherein Virginia Ryer was plaintiff, and Frank Ryer was defendant, it was ordered that the said Frank Ryer be committed to the common jail of said county, there to

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remain, charged with the contempt mentioned in said order until he should have paid the sum of \$110 alimony therein imposed upon him, together with the costs and expenses of the proceedings for such misconduct amounting to the sum one of hundred and thirty-one $\frac{36}{100}$ dollars, and a warrant issue to carry said order into effect,

Now, therefore, we command you that you take the body of the said Frank Ryer and him safely and closely keep in your custody in the common jail of the county of New York until he shall have fully paid the sum imposed as aforesaid, to wit, the sum of \$110, and also the costs and expenses aforesaid amounting to one hundred and thirty-one $\frac{36}{100}$ dollars, with your fees hereon, or until the said Frank Ryer shall be discharged by the further order of this court, and you are to return this writ and to make and return to our said court a certificate under your hand of the manner in which you shall have executed the same.

Witness, Charles Donohue, one of the justices of our said court, at the county court house, city of New York, on the 11th day of September, 1883.

BAKER, BAILEY & BAKER,
Plaintiff's Attorneys.

Endorsed: Order of arrest, allowed. September 11, 1883.

C. DONOHUE,
Justice.

CHAPTER XX.

ACTIONS RELATING TO A CORPORATION.

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 Art. 1. Provisions Relating to Practice in Actions by or against Corporations.

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ARTICLE I.

 PROVISIONS RELATING TO PRACTICE IN ACTIONS BY OR
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- SUB. 1. COMPLAINT IN ACTIONS BY OR AGAINST CORPORATIONS, § 1775.
2. WHEN FOREIGN CORPORATION MAY SUE AND BE SUED. §§ 1779, 1780.
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4. RESTRICTIONS UPON DEFENCE BY CORPORATION IN SUIT ON NOTE. § 1778.

 SUB. 1. COMPLAINT IN ACTIONS BY OR AGAINST CORPORATIONS.
 § 1775.

§ 1775. Complaint in actions by or against corporations.

In an action brought by or against a corporation, the complaint must aver that the plaintiff, or the defendant as the case may be, is a corporation; must state whether it is a domestic or foreign corporation; and, if the latter, the State, country, or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to any act or proceeding, by or under which the corporation was created.

It was held in *Kennedy v. Cotton*, 28 Barb. 59, that it was unnecessary for a domestic corporation to aver its corporate existence; this view was dissented from in *Phoenix Bank v. Donnell*, 41 Barb. 571. It was, as appears from the notes of the codifiers, the intention to establish an obligatory rule of pleading in this respect, for both domestic and foreign corporations, by compelling such averment. It is unnecessary to set out the powers of the corporation. *Feecey v. People's Fire Insurance Co.* 2 Robt. 599. Where corporations are spoken of in the Code, without discriminating

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between domestic and foreign corporations, all corporations are meant to be included. *Plimpton v. Biglow*, 3 Civ. Pro. R. 182. It is held in *Baker v. Star Printing and Publishing Co.* 3 Law Bull. 29, that where the title of the action and the complaint show defendant is a corporation, the complaint is demurrable unless there is an allegation of incorporation. The contrary is held in *Irving National Bank v. Corbett*, 10 Abb. N. C. 85, on the ground that it cannot be assumed that the plaintiff is a corporation, and the objection must be raised by answer. An allegation "that the plaintiff is a joint-stock copartnership company, limited, duly organized under and by virtue of the laws of Pennsylvania, with the power to sue and be sued in its corporate name as a corporation," is a sufficient averment of corporate existence. Where the defendant dealt with the plaintiff as a corporation, and treated it as such, he is estopped from questioning its corporate character. *The Gorton Steamer Co. v. Spofford*, 5 Civ. Pro. R. 116. In *Clegg v. American Newspaper Union*, 7 Abb. N. C. 59, it was held that where a complaint alleged certain defendants were foreign corporations, but did not set forth the State, country or government by or under whose laws they were created, that a demurrer on the ground it did not state facts sufficient to constitute a cause of action interposed by one of such defendants should be sustained; that the objection was one that could be taken by demurrer, following 3 Law Bull. 29, *supra*, distinguishing 10 Abb. N. C. 85, *supra*, and, also, distinguishing *For v. Eric Preserving Co.* 93 N. Y. 54, which holds that a complaint may be amended by adding the averment of incorporation, it being no part of the cause of action, but simply relating to the character or capacity of one of the parties. Again, *Hafner v. Schoen Furniture Co.* 10 Civ. Pro. R. 176, holds, where the complaint in an action alleged that the plaintiff was a duly organized corporation, but omitted to state whether it was a foreign or domestic one, that the defect could not be taken advantage of by demurrer, on the ground that it did not state facts sufficient to constitute a cause of action; that the cause of action, not being dependent on the fact whether the corporation was domestic or foreign, and being complete, in either case the complaint stated facts sufficient to constitute a cause of action. The only effect of this section is to enable defendant to require plaintiff to advise, by statements in the complaint, as to these facts, while *First Na-*

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tional Bank of Northampton v. Doying, 11 Civ. Pro. R. 69, decides that the complaint, in an action by a corporation alleged to have been organized by act of Congress, should also state whether it is a foreign or domestic corporation. The objection that the complaint is insufficient, because it fails to state whether the corporation is foreign or domestic, is properly made by demurrer. Before the present Code it was not necessary to allege that plaintiff was a corporation, and, if no allegation was made in the answer denying incorporation, proof of that fact was unnecessary. *Trustees Canandaigua Academy v. McKeechnie*, 90 N. Y. 618.

There has been a very sharp conflict of authority among the General Terms of the State as to whether a complaint which failed to show whether a corporation was a domestic or foreign corporation is demurrable. In addition to the authorities cited above, it has been held that a complaint in an action against a corporation, which omits to state whether the defendant is a domestic or foreign corporation, and if the latter, the State, county or government by or under whose laws it was created, is defective and a demurrer thereto on the ground that it fails to state facts sufficient to constitute a cause of action is well taken, in *Chandler v. Eric Transfer Co.* 19 Civ. Pro. R. 385, s. c. 13 Supp. 573; *National Temperance Society & Publication House v. Anderson*, 17 St. Rep. 389; *Oesterreicher v. Sporting Times Publishing Co.* 5 N. Y. Supp. 2; *Gilpin v. Baltimore & Ohio R. R. Co.* 17 Supp. 520; s. c. 44 St. Rep. 298; *Farmers & Merchants' National Bank of Buffalo v. Rogers*, 15 Civ. Pro. R. 250, affirmed, 17 St. Rep. 381.

While it is held that an allegation in a complaint that the defendant is a corporation constitutes no part of the cause of action, but simply relates to the character or capacity of the defendant, and, therefore, a complaint which does not allege that the defendant is a corporation, although such might be inferred to be the fact from its name, is not demurrable on the ground that it does not state facts constituting a cause of action. *Adams v. Lamson Store Service Co.* 59 Hun, 127, s. c. 35 St. Rep. 518, 20 Civ. Pro. R. 152, 13 Supp. 118, and to same effect, *American Baptist Home Mission Society v. Footc*, 52 Hun, 307; *U. S. Mercantile Reporting Co. v. U. S. Mercantile Reporting & Collecting Association*, 21 Abb. N. C. 115, the same rule is held in *Rothchild v. The Grand Trunk R. R. Co. of Canada*, 30 St. Rep. 642, s. c. 19 Civ. Pro. R. 53, 10 Supp. 36, affirmed 38 St. Rep. 869, s. c. 14

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Supp. 807, where it is held that the omission to allege the corporate character of the defendant was not available on demurrer, but must be reached on motion, and the same rule is laid down in *Laney v. Laney*, 33 St. Rep. 673.

The question is fully considered in *Fraser v. Granite State Provident Association*, 58 St. Rep. 803, and the same conclusion arrived at upon the authority of *Fox v. Erie, etc. Co.* 93 N. Y. 54.

The question as to whether it is a ground of demurrer that the complaint in an action which states that defendant is a corporation and fails to state whether it is a domestic or foreign corporation seems to be settled in *Harmon v. Vanderbilt Hotel Co.* 79 Hun, 392, 29 Supp. 783, 61 St. Rep. 347, where it is held that a cause of action in a complaint is represented by the facts which constitute the grounds of the claim against the defendant; the allegations that the defendant is a corporation is no part of the cause of action, but relates to the character or capacity of the defendant; that demurrer would not lie, affirmed, without opinion, 143 N. Y. 665. See *Fraser v. The Granite State Provident Assn.* 8 Misc. 8, 23 Civ. Pro. R. 390, 58 St. Rep. 803; *Noye Mfg. Co. v. Raymond*, 8 Misc. 355, 28 Supp. 693, 59 St. Rep. 589.

A complaint which states the facts from which a conclusion must follow as to whether the plaintiff is a foreign or domestic corporation, although the fact is not specifically alleged, sufficiently complies with this section of the Code. *American Baptist Home Mission Society v. Footc.* 52 Hun, 307, s. c. 23 St. R. 462.

A complaint in fact avers that a corporation was organized under the laws of the United States, which states that it had done business in Buffalo, N. Y., upwards of ten years, and where the name is given as "Farmers and Mechanics' National Bank of Buffalo." *Farmers and Mechanics' National Bank v. Rogers*, 17 St. Rep. 381, affirming 15 Civ. Pro. R. 250. So a complaint which alleges "that the plaintiff is and at the times hereinafter stated was a banking association created and organized under the laws of the State of New York, with its banking house located and principally transacting business in the city of New York," affirmatively shows that the plaintiff is a domestic corporation although these words are omitted therefrom. *Columbia Bank v. Jackson*, 24 St. Rep. 738, s. c. 4 Supp. 433. So, also, an allegation is sufficient that the plaintiffs "are a corporation doing business

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under the name of the Crown Point Iron Company in the town of Crown Point, Essex county, N. Y." It is further held in this case that the principle at least of the rule applies to Justices' Court. *Crown Point Iron Co. v. Fitzgerald*, 14 St. Rep. 427.

Where a complaint alleges the due organization of the corporation that imports the requisite number of corporators. It is not necessary to aver the precise steps necessary to accomplish the result. *Lorillard v. Clyde*, 86 N. Y. 384. It is not necessary to make the allegations required by this section to obtain an attachment. *Lee v. La Compagnie, etc.* 2 St. Rep. 612. Where a member of a *de facto* corporation contracts with it in a corporate capacity, neither party can dispute its corporate character. *Whitford v. Whitford*, 94 N. Y. 145, reversing 25 Hun, 136. Persons claiming to be officers of a corporation are estopped from denying the fact that it is incorporated. *People ex rel. Sturges v. Keesee*, 27 Hun, 483. The objection that a corporation had ceased to exist by reason of failure to file in the proper county a certificate for the purpose of continuing its existence, is not available to one who, for many years after such failure, continued to deal with the corporation on the assumption that it was still existing. Abb. Ann. Dig. 1886, p. 81. Where an individual receives the property of a corporation, through a contract made with such corporation by its corporate name, and there is extrinsic proof of the user of such corporate powers by such corporation on previous occasions, the party so receiving the property is estopped from denying the incorporation in an action against him for such property. *Commercial Bank v. Pfeiffer*, 13 St. Rep. 506.

An action or special proceeding cannot be prosecuted against the city of New York, unless the complaint alleges that thirty days have expired since the claim was presented to the comptroller, and that he has neglected or refused to make such adjustment. Chap. 410, Laws 1882, § 1104. The charters of most, if not all, the cities in the State have like provision, and numerous decisions have been made and reported arising thereon. It is held, *Baine v. City of Rochester*, 85 N. Y. 523, affirming 23 Hun, 521, that the non-presentation of a claim against a municipal corporation to its chief officer is not a defence to the action, and not a fact involved in the trial, but plaintiff cannot recover costs. Followed, *Dressel v. City of Kingston*, 32 Hun, 529. Hence it need not be alleged.

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For interpretations of similar provisions, see *Quinlan v. City of Utica*, 11 Hun, 217, affirmed, 74 N. Y. 603; *McGaffin v. City of Cohoes*, 74 N. Y. 387.

Baine v. City of Rochester, 85 N. Y. 523, and *Dressel v. City of Kingston*, 32 Hun, 529, have reference only to the interpretation of § 3245 of the Code, and have no relation to the rules laid down by statute to which reference is made.

This topic is more pertinent to a treatise upon pleading than to matters relating to actions against corporations but as the same criticism may be made with reference to the provisions of the section already treated and those of subsequent sections, attention is called to the requirements of the several statutes in reference to actions against cities, villages and towns in view of the fact that in *Olmstead v. Town of Poundridge*, 71 Hun, 26, it is held that the conditions imposed must be pleaded upon the authority of *Reining v. City of Buffalo*, 102 N. Y. 308.

Chapter 572, Laws of 1886, provides that no action against a city having 50,000 inhabitants or over, to recover for personal injuries by reason of negligence, shall be maintained unless it shall be commenced within one year, and notice of the intention to commence the action shall have been filed with the proper law officer of the county within six months after the cause of action shall have accrued.

Chapter 568, § 16, Laws of 1890, provides that no action shall be maintained against a town to recover damages sustained by reason of defect in its highways or bridges on account of neglect of the proper officer, unless a verified statement of the cause of action be presented to the supervisor within six months after the cause of action shall accrue, and that no action shall commence until fifteen days after the service of such statement.

Chapter 291, Laws of 1870, as amended, chapter 440, Laws of 1889, provides that no action shall be maintained against a village for damages for personal injuries or injuries to property arising from negligence unless the claim shall have been presented to the board of trustees. In *Fredrich v. Village of Saugerties*, 70 Hun, 589, it is held that this provision applies to villages having special charters and is a condition precedent to the maintenance of such an action.

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SUB. 2. WHEN FOREIGN CORPORATION MAY SUE AND BE SUED.

§§ 1779-1780.

§ 1779. When foreign corporation may sue.

An action may be maintained by a foreign corporation, in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law. But a foreign corporation cannot maintain an action, founded upon an act, or upon a liability or obligation, express or implied, arising out of, or made and entered into in consideration of, an act, which the laws of the State forbid a corporation or association of individuals to do, without express authority of law. This section does not affect the validity of a meeting of the stockholders or directors of a foreign corporation, held within the State, where such a meeting is authorized by the laws of the State, country, or government by or under which the corporation is created; or of an act, done at such a meeting, which is not in conflict with the same laws, or the laws of the State.

§ 1780. When foreign corporation may be sued.

An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the State, or relating to property situated within the State, at the time of the making thereof.
2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.
3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

See provisions, § 15, chap. 687, Laws 1892, prohibiting foreign corporations from bringing suit in this State until it has complied with the provisions of that chapter with regard to payment of organization tax.

A foreign corporation, keeping an office in this State for receiving deposits and discounting notes, without being authorized by the law of th's state to do so, cannot maintain an action for the money loaned, either on a note or other security taken on such loan, or on the count for money lent. *New Hope, etc. Co. v. Poughkeepsie Silk Co.* 25 Wend. 648. But a foreign banking corporation coming into this State, by their agents, to secure a doubtful debt, and while here drawing a single bill of exchange and paying out their own circulating notes. in pursuance of their leading object, not having an office here, do not violate the law; *Western Reserve Bank v. Potter*, Clarke's Ch. 432; nor is it contrary to the laws of this State for a foreign corporation to take

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as security a mortgage on lands in this State, and it may maintain a foreclosure. *Silver Lake Bank v. North*, 4 Johns. Ch. 370. It is no fraud against our statute or the defendant to assign the cause of action held by a foreign corporation to a resident for prosecution; and it seems the objection is waived by a full appearance in the action. *McBride v. Farmers' Bank*, 26 N. Y. 450; *Petersen v. Chemical Bank*, 32 N. Y. 48. A foreign creditor rightfully in the courts of this State, pursuing a remedy given by the statutes of the State, may enforce that remedy to the same extent, in the same manner and with the same priority of lien as if a resident. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367. The fact that defendant is a foreign corporation is no objection to its maintaining an action. Citing *Merrick v. Van Sanford*, 34 N. Y. 208; *Diamond Match Co. v. Roebor*, 11 St. Rep. 47.

In an action by or against a foreign corporation, the existence of the corporation need not be proved unless there is an affirmative allegation in the answer that the plaintiff or the defendant, as the case may be, is not a corporation. Section 1776 construed in connection with § 1779, holds that the former section is equally applicable to foreign as well as to domestic corporations. *McElwee Manufacturing Co. v. Trowbridge*, 68 Hun. 28; s. c. 22 Supp. 674, s. c. 52 St. Rep. 64; *Taendsticksfabriks Aktiebolaget Vulcan v. Myers*, 58 Hun. 161; s. c. 11 Supp. 663; s. c. 34 St. Rep. 122.

The City Court of the city of New York has jurisdiction of an action by a foreign corporation when a note payable within the State, though outside of that city, by virtue of the provisions of this section that foreign corporations may be sued in the same manner and subject to the same limitation as domestic corporations. *Globe Yarn Mills v. Bilbrough*, 28 Abb. N. C. 426; 46 St. Rep. 271; 19 Supp. 176, affirmed, 2 Misc. 100; 21 Supp. 2, 49 St. Rep. 702.

Where an order for goods was given to a foreign corporation outside the State, the corporation cannot be said by reason thereof to have been doing business in the State of New York within the meaning of § 15, chapter 687, Laws of 1892; that a restriction prohibiting a foreign corporation doing business within the State of New York without a certificate, from maintaining any action in the State upon any contract made by it in the State until it shall have procured such certificate, relates only to con-

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tracts made within the State of New York. *Novelty Manufacturing Co. v. Connell*, 88 Hun, 254. Before the passage of that statute, a foreign corporation had the same capacity to sue as had a domestic corporation. After that date it must have such certificate, and the provision of the statute is applicable where the corporation, has been doing business in defiance of the law. *Providence Steam and Gas Pipe Co. v. Connell*, 86 Hun, 319. In *Murphy, etc. Co. v. Connell*, 10 Misc. 553, it was held that the act referred to was in violation of the Constitution of the United States, and further, that goods sold through an agent of a foreign corporation, where the order was forwarded to another State and the goods shipped from that State, the statute is inapplicable. See also, *Nicoll v. Clark*, 13 Misc. 128. *Contra*, *Sawyer Lumber Co. v. Bussell*, 84 Hun, 114.

No public policy forbids the transaction of business in this State by a corporation formed in another State and by citizens in this State for the purpose of transacting business here. Power rests with the Legislature exclusively to say whether any and what terms shall be imposed upon such a corporation as a condition of its doing business here, and in the absence of any statute on the subject, and unless it appears the corporation is formed to do acts prohibited by the courts of the State, if it is legally incorporated and entitled to recognition in the courts of the State where it is organized, it is entitled to recognition here. *Demarest v. Flack*, 128 N. Y. 205.

A resident of the State may maintain an action against a foreign corporation for any cause of action. *Prouty v. Railroad Co.* 1 Hun, 655. The Supreme Court, at suit of a resident plaintiff, may enjoin a non-resident defendant from exhibiting a drama in a foreign State, where the process is served on the defendant while in this State. *French v. Maguire*, 55 How. 471. The voluntary assignee of a non-resident can maintain an action in the courts of this State. *McBride v. Farmers' Bank*, 26 N. Y. 450. Under § 427, Code of Procedure, for which this action is substituted, authorizing the bringing of an action against a foreign corporation by a resident of this State for any cause of action, *held*, that an action was properly brought in this State by an executor of a resident therein, upon a policy of insurance issued by a Connecticut corporation upon the life of the testator who resided and died in that State, the will having been admitted to probate in

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that State, and afterward, upon production to the surrogate of an authenticated copy, having been admitted to probate in this State. *Palmer v. Phoenix Mutual Life Ins. Co.* 84 N. Y. 63. In an action brought by a foreign corporation upon a cause of action not arising within this State, the complaint was dismissed as to all the non-resident plaintiffs, and continued as to all the others; subsequently all the non-resident plaintiffs assigned their cause of action to a resident to enable him to prosecute the action for their benefit, and asked leave to file a supplemental complaint alleging the transfer; the application was denied on the ground the assignment could not have a retroactive effect and create a right to enforce a cause of action which did not exist in favor of the assignors when the suit was brought. *Ervin v. Oregon, etc. Co.* 28 Hun, 269. In *Gibbs v. Queens Ins. Co.* 63 N. Y. 114, it was held that under § 427 of the old Code, which is substantially embodied in § 1780, an action may be commenced in the courts of this State against a foreign fire insurance company, by the service of a summons in the form prescribed by the Code in a civil action, and that no other process is required for the commencement or maintenance of the action. It seems that the judgment rendered in the action should be general in its character and not directed against any specific property. The authorities upon the subject of bringing actions against absent non-residents by process not personally served, and as to the effect of judgment therein, are there collated and discussed. Same principle, *Burns v. Provincial Ins. Co.* 35 Barb. 525. See *Barnett v. Chicago, etc. R. R. Co.* 4 Hun, 114. The Legislature has the power to provide for and authorize the method of service. Any service is sufficient which apprises the party proceeded against of the action, and service on a director of a foreign corporation temporarily in the State is authorized by statute, and no constitutional right of the party is violated. *Hiller v. B. & M. R. R. Co.* 70 N. Y. 223. The same rule is held in *Pope v. Terra Haute Car Co.* 87 N. Y. 137, and it seems the judgment will be valid for any purpose within the State, and can be enforced against any property of the corporation within the State. The manner of commencing the action is prescribed by § 432. Our courts have jurisdiction of an action brought by a citizen of this State against a foreign corporation, in which he is a stockholder, to restrain illegal acts of the directors when they are personally within the jurisdiction of the court.

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Fisk v. Chicago, etc. R. R. Co. 53 Barb. 513; and of an action by a resident in which the principal defendant is a foreign corporation, brought to procure a sale of bonds delivered by it as collateral to its notes. *Coffin v. Chicago, etc. R. R. Co.* 4 Hun, 625.

Our courts have jurisdiction of a suit by one foreign corporation against another and certain individuals, resident citizens of this State. *Direct U. S. Cable Co. v. Dominion Tel. Co.* 84 N. Y. 153, reversing 23 Hun, 568. Our courts will not interfere with the general business of a foreign corporation; *Way v. Keyport, etc. Co.* 16 Abb. 320 n; *Howe v. Deuel*, 43 Barb. 504; nor to regulate their internal affairs, unless fraud is shown jeopardizing the property of stockholders in this State. *Howell v. Chicago, etc. Co.* 51 Barb. 378. A resident plaintiff stockholder in a foreign corporation may maintain an action against it though the property of the corporation is beyond the jurisdiction of the court. *Erwin v. Oregon, etc. Co.* 62 How. 490. A national bank, located within this State, is a domestic corporation, and may sue here a national bank without the State, or any foreign corporation, for any cause of action. *Market Nat. Bank v. Pacific Nat. Bank*, 4 Law Bull. 82. And jurisdiction over a foreign corporation may be obtained by a general appearance. *Root v. Great Western R. R. Co.* 65 Barb. 619, affirmed, 55 N. Y. 636; *De Bemer v. Drew*, 57 Barb. 438, the latter case holding that the court can, in such a case, appoint a receiver of the former corporation. Suits by or against foreign corporations are not maintained on the theory that the corporation litigant is here in person, but that it is represented by its agent, and it may sue or be sued in the courts of this State. *Plimpton v. Bigelow*, 93 N. Y. 592. The court cannot acquire jurisdiction by consent, and, whenever attention is called to it, may refuse to exercise its powers. *Davidsburgh v. Knickerbocker Life Ins. Co.* 90 N. Y. 526.

A foreign corporation cannot sue another foreign corporation in the courts of this State unless the cause of action has arisen or the subject thereof is situated in this State. *Western Bank v. City Bank of Columbus*, 7 How. 238. When an action was commenced between two corporations, which related to lands situated in another State, seeking to annul a conveyance of such lands to the defendants, *held*, the court had no jurisdiction. *Cumberland, etc. Co. v. Hoffman*, 30 Barb. 165. To enable a non-resident plaintiff to maintain an action in the courts of this State

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against a foreign corporation, it must appear either that the action is upon a contract made, executed and delivered in this State, or that the subject thereof is situated in this State. *Harriott v. New Jersey R. R. Co.* 8 Abb. 284. Where an attachment issued in an action against a foreign corporation by a non-resident plaintiff against their property here, in an action for damages arising on a breach of contract made out of this State, it was held the court had no jurisdiction. *Whitehead v. Buffalo, etc. R. R. Co.* 18 How. 218. Since the adoption of this section a foreign corporation can only be sued by a non-resident in the cases mentioned therein. *Erwin v. Oregon, etc. Co.* 28 Hun, 269. Nor can a foreign corporation be sued by another foreign corporation except in the cases therein specified. The provision is constitutional. *Duquesne Club, etc. v. Penn Bank of Pittsburg,* 35 Hun, 390. To enable a non-resident plaintiff to maintain an action against a foreign corporation it must appear that the action is either upon a contract made in this State, or that the subject thereof is in this State. *Cantwell v. Dubuque, etc. Co.* 17 How. 16; *Brooks v. Stone,* 19 How. 395; *Campbell v. Chamberlain, etc. R. R. Co.* 18 How. 412. In the absence of any allegation in the complaint that plaintiff is a non-resident of the State, and therefore disqualified to sue as a foreign corporation under section 1780, such non-residence will not be presumed in support of a demurrer on the ground of want of plaintiff's capacity to sue. *Leslie v. Lorillard,* 18 Week. Dig. 288. Defendant's answer set up that both parties were non-residents, and the case not within this section. Four months later, defendant gave notice of motion to dismiss on same ground. *Held,* that a denial of the motion without prejudice to defendant's right to raise it on the trial was right. *Edwards v. Berkshire Life Ins. Co.* 19 Week. Dig. 423. Where both plaintiff and defendant are foreign corporations, the court has jurisdiction, if the cause of action arose in this State. *Toronto Trust Co. v. Chicago, etc. R. R. Co.* 32 Hun, 190.

At common law, and before the statutes of this State, a foreign corporation could not be sued in any case in the courts of this State unless it saw fit to voluntarily appear. A non-resident of the State cannot maintain an action in a court of this State against a foreign corporation to compel the specific performance of a contract to sell lands situate without the State. An action to compel the specific performance of such a contract affects the

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title to real property. *Hann v. Barnegat, etc. Co.* 7 Civ. Pro. R. 222. The Superior Court of the city of New York has no jurisdiction in an action brought by a non-resident against a foreign corporation, and the objection to the jurisdiction may be taken at any time. *Brooks v. Mexican, etc. Co.* 3 Civ. Pro. R. 36. Sections 1778, 1779, 1780 do not apply to a municipal corporation. *Roosevelt v. Edson*, 7 Civ. Pro. R. 5.

If a contract is made at one place, but is to be performed at another, the place of performance governs as to where the cause of action arose. *Burckle v. Eckhart*, 3 N. Y. 132. But it is said that a note drawn in Iowa, but payable in New York, is not, as against the makers, a cause of action arising in this State. *Cantwell v. Dubuque, etc. R. R. Co.* 17 How. 16. When parties reside and do business in New York, and there indorse and procure to be discounted, a note payable in another State, such indorsement is a New York contract. *Artisans' Bank v. Park Bank*, 41 Barb. 599. A note dated and payable here, but negotiable elsewhere, is governed by our laws. *Fewell v. Wright*, 30 N. Y. 259. An action for loss of baggage may be maintained here if the contract was made here. *Jones v. Norwich, etc. Co.* 50 Barb. 193, criticised and limited in *McCormick v. Pennsylvania R. R. Co.* 49 N. Y. 303, which holds that where the court has jurisdiction of the subject-matter of the cause of action, consent may confer jurisdiction of the person. A national bank in New Orleans drew a draft on bankers in New York, payable to the order of plaintiff, who did business in New York; after presentment and protest, action was begun and an attachment levied upon the property of the drawer. *Held*, that the cause of action arose in this State, and the action was properly brought here. *Hibernia National Bank v. Lacombe*, 84 N. Y. 367, affirming 21 Hun, 166. Where the demand arose on written contracts executed and made payable in Canada, and the work contracted for, except a small portion, was done there, *held*, not a New York contract. *Campbell v. Champlain, etc. R. R. Co.* 18 How. 412. But where a contract was made in Canada and was chiefly performed here, *held*, suit would lie here. *Johnson v. Adams Tobacco Co.* 14 Hun, 89.

Where plaintiff made a contract with a foreign corporation, work to be done partly here and partly abroad, an office to be kept in New York, *held*, that the cause of action arose in this

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State. *Hiller v. B. & M. R. R. Co.* 70 N. Y. 223. Where a loan is made by one non-resident to another, out of the State, but secured by a draft drawn on a person residing in the State, the cause of action does not arise here. *Western Bank v. City Bank*, 7 How. 238. But if bonds and coupons, made in another State, are payable here, the court has jurisdiction, though both parties are foreign corporations. *Connecticut Mutual Ins. Co. v. Cleveland R. R. Co.* 41 Barb. 9.

The courts of this State have no jurisdiction of the assets of a foreign corporation, even if the trustees are resident here. *Redmond v. Enfield Man'f'g Co.* 13 Abb. (N. S.) 332. Our courts will not entertain jurisdiction to enjoin the business of a foreign corporation where such injunction would practically suspend the corporate franchise. *Way v. Keyport, etc. Co.* 16 Abb. 320 n. Chancery had no jurisdiction to dissolve a foreign corporation and wind up its affairs, although its property is mainly situated here. *Barclay v. Tallman*, 4 Edw. 123. But it may appoint a receiver for the purpose of preserving its property. *Murray v. Vanderbilt*, 39 Barb. 140. The Supreme Court has power to restrain the use of the proceeds of an illegal issue of stock by a foreign corporation, and to appoint a receiver. *Fisk v. Chicago, etc. R. R. Co.* 51 Barb. 513. Our courts have no jurisdiction in equity to restrain a foreign corporation from doing certain threatened acts in another State in the nature of a local trespass. *Atlantic & Pacific Tel. Co. v. B. & O. R. R. Co.* 46 Super. Ct. 377. Our courts have no jurisdiction over a receiver of a foreign corporation appointed by the court of another State. *Smith v. McNamara*, 15 Hun, 477; *Killmer v. Hobart*, 58 How. 452. But where a receiver was appointed in another State of a foreign corporation, but its funds and officers were here, and the funds in unsafe hands, *held*, a stockholder could maintain an action for a receiver. *Redmond v. Hoge*, 3 Hun, 171. A person wrongfully in possession in this State, of the assets of a foreign corporation is liable to an action by creditors in this State. *Tinkham v. Borst*, 31 Barb. 407. A creditor of a foreign corporation may pursue his demand in this State, against a corporation formed in this State, to whom the property of such foreign corporation has been transferred, in consideration of the issue of shares in the New York company to the stockholders of the foreign company. *Barclay v. Quicksilver Mining Co.* 9 Abb. (N. S.) 283. Our courts may obtain jurisdic-

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tion over a foreign corporation by service of process on its president within this State, though the service is effected by a trick. *Atlantic, etc. Co. v. B. & O. R. R. Co.* 46 Super. Ct. 377. A voluntary appearance by a corporation confers jurisdiction, as in case of a natural person, to the same extent as actual service of process. *Attorney-General v. Guardian Ins. Co.* 77 N. Y. 272. But not so as to an appearance to move to set aside irregular process. *Tiffany v. Lord*, 5 N. Y. 310. Nor is want of jurisdiction of the subject-matter waived by voluntary appearance. *Callahan v. New York*, 66 N. Y. 656. But jurisdiction having been once acquired over the parties and subject-matter, every presumption is in favor of the legality of the judgment. *Blake v. Lyon, etc. Man'g Co.* 77 N. Y. 626.

The courts of this State will entertain actions in favor of resident plaintiffs against foreign corporations not only to recover at law but also in equity, including suits in favor of resident shareholders who have clear rights to be protected, and they will compel the enforcement by officers and directors of foreign corporations, if properly brought into court, of the contract obligations of the corporation, if the neglect or violation of such contract obligations amounts to a breach of trust or duty which will be productive of injury to such resident shareholders, in matters removed from the ordinary powers or discretion of such directors, and no adequate remedy at law is available. The courts of this State will refuse to act against foreign corporations, however, in a suit brought by a resident stockholder against them, where only the mere internal affairs of the corporation, resting in the untrammelled discretion of its directors as its governing or controlling agents, are involved; or where the remedy sought can only be given by the courts of the sovereignty by which the corporation was created, or where a decree would be abortive. *Ives v. Smith*, 19 St. Rep. 556.

A foreign executor who takes out ancillary letters on his estate, becomes a domestic executor and may be sued as such by a foreign creditor on a claim arising in this State. A recovery in such action cannot be defeated on the ground that it may be ineffective because, as against him, the executor would be required to transmit all collected assets with the original probate jurisdiction. The word "only," § 1780, is inserted as a word of restriction, and implies a general jurisdiction purposely narrowed and restrained.

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Hopper v. Hopper, 125 N. Y. 400; S. C. 35 St. Rep. 400; S. C. 20 Civ. Pro. R. 102.

In an action against a foreign corporation to recover for injuries causing death which occurred outside of the State, it is sufficient if the complaint show that the foreign statute, upon which the action was based, is of similar import and character to that of this State. It is not necessary that it should be exactly the same. If it does not appear upon the face of the complaint that defendant is a foreign corporation, a demurrer cannot be sustained. In such case the objection must be raised by a motion to set aside the summons where an appearance would confer jurisdiction; or in cases where an appearance would have conferred jurisdiction, it may be raised by answer or at the trial, or upon appeal or by the court itself. *Guernsey v. Grand Trunk R. R. Co. of Canada*, 37 St. Rep. 557; S. C. 13 Supp. 645. Section 1780 does not prevent the courts of this State from entertaining jurisdiction, but, on the other hand, expressly gives jurisdiction where the cause of action arose in this State. *Gricsa v. Massachusetts Benefit Association*, 39 St. Rep. 1; S. C. 15 N. Y. Supp. 71.

Where parties resident in New Jersey made a contract in that State, the courts of this State will not entertain jurisdiction. *Perry v. Erie Transfer Company*, 28 Abb. N. C. 430, affirmed, 46 St. Rep. 185, 19 Supp. 239. Same case, on a subsequent trial and appeal, 53 St. Rep. 136. See, also, same case, 16 Supp. 153, 19 Supp. 239; 20 Supp. 891, 23 Supp. 878, 4 Misc. 598, 1 Misc. 208, 22 Civ. Pro. R. 178.

A non-resident cannot maintain an action against a foreign corporation unless the contract was made within the State or unless the cause of action arose therein. Unless a foreign corporation appears in such an action and either expressly or tacitly acquiesces in the jurisdiction to the court, none is acquired unless it is established either that the plaintiff is a resident of or that the contract was made or the cause of action arose within the State. An attachment will not be supported under such circumstances. *Smith v. Union Milk Company*, 70 Hun, 348; S. C. 53 St. Rep. 891, 24 Supp. 79. Where nothing appears to the contrary, the court will assume that plaintiffs are residents of the State and take jurisdiction of an action against a foreign corporation. *Sims v. Bonner*, 16 Supp. 801; S. C. 21 Civ. Pro. R. 355.

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The City Court of New York has jurisdiction in an action by residents or domestic corporations against foreign corporations for every cause of action over which it has jurisdiction against residents or domestic corporations under § 1780. In the absence of an allegation in the complaint that plaintiff is a non-resident of the State and, therefore, disqualified to sue a foreign corporation by reason of § 1780, such non-residency will not be assumed in support of a demurrer on the ground of want of plaintiff's capacity to sue. *Hand v. Society for Savings of Cleveland*, 44 St. Rep. 785, citing *Leslie v. Lorillard*, 18 Week. Dig. 288.

The Superior Court of New York has jurisdiction of an action by a resident of this State against a foreign corporation for an injury inflicted in another State where process has been legally served within the county, the plaintiff being a resident of this State. *Flinn v. Central Railroad Co. of New Jersey*, 51 St. Rep. 84, affirming 27 Abb. N. C. 31; s. c. 15 Supp. 328; s. c. on second appeal, 22 Supp. 383; s. c. 20 Civ. Pro. R. 179; s. c. 23 Civ. Pro. R. 106; s. c. 2 Misc. 508. A court of this State has no jurisdiction to grant an attachment unless it appears that the plaintiff is a resident of this State or that the contract was made in the State or that the cause of action arose therein as against a foreign corporation. *Adler v. Order of American Fraternal Circle of Baltimore City*, 19 Supp. 885; s. c. 28 Abb. N. C. 233, citing *Oliver v. Manufacturing Co.* 10 N. Y. Supp. 771. For note on the question "What is to be deemed the place where the cause of action arose?" see 28 Abb. N. C. 435.

The jurisdiction of the Supreme Court over the persons of parties to an action may be presumed and the facts conferring jurisdiction need not be set forth. Defects to be available on demurrer must appear on the face of the complaint, and where the Supreme Court has jurisdiction of the subject-matter of an action against a corporation a demurrer is not well taken where the non-residence of plaintiff does not appear on the face of the complaint. *Gervais v. Chicago, Rock Island, etc. R. R. Co.* 18 Civ. Pro. R. 404. The court has no jurisdiction over a foreign corporation in an action brought against it by a non-resident except as provided in § 1780, and objection to the jurisdiction may be taken at any time although defendant has appeared generally and put in an answer in which such objection is not taken. Where some of joint plaintiffs are non-residents and the remainder are residents, the objec-

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tion to the jurisdiction still holds good. *Brooks v. Mexican Construction Co.* 49 Super. Ct. 234

A non-resident, though appointed an administrator in this State, does not become a resident of the State so as to enable him to maintain an action against a foreign corporation in a cause of action for a tort which did not arise within this State. Jurisdiction cannot be conferred on the parties by consent or stipulation of the parties, and the objection may be taken at any stage of the action, and it seems the court may, upon its own motion, when attention is called to the facts, refuse to proceed further and dismiss the action. *Robinson v. Oceanic Steam Navigation Co.* 112 N. Y. 315, affirming 15 Civ. Pro. R. 88; s. c. 56 Super. Ct. 108.

Section 1780 specifies the only cases in which an action against a foreign corporation may be maintained by a non-resident in the courts of this State. Every rule of comity and of natural justice is satisfied by giving redress in our courts to non-resident litigants where the cause of action arose or where the subject-matter of the litigation is situated in this State. Even where our courts have jurisdiction in a cause of action affecting a non-resident, they may, from motives of policy, refuse to exercise it. *Colorado State Bank v. Gallagher*, 76 Hun, 310.

Stromeyer v. Combes, 2 Supp. 232; s. c. 18 St. Rep. 154, holds that a stockholder cannot sue an officer of a corporation for injury to corporate property caused by the latter's misfeasance in office unless the corporation refuses to sue, and in that case the corporation must be made a party defendant. Section 1780 of the Code is held not to apply to a stockholder under such circumstances, but on the other hand, resident stockholders of a foreign corporation may maintain an action under this section to enjoin it and its directors from constructing branch lines of railroad and from expending funds therefor which are within the State, to the irreparable injury of the stockholders. *Ives v. Smith*, 3 Supp. 645; s. c. 19 St. Rep. 556.

Attachment against a foreign corporation is void where it is granted on papers which do not affirmatively show that the case is within the provisions of § 1780. That section does not restrict the constitutional jurisdiction of the Supreme Court, but confers jurisdiction of foreign corporations in cases where it did not exist before. *Ladenburgh v. Commercial Bank of Newfoundland*, 67

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St. Rep. 466, 87 Hun, 269, 24 Civ. Pro. R. 234. Whether a cause of action arose within the State or within the boundary of a foreign State must be determined by the allegations of the pleadings exclusively. The regular method of raising the question of jurisdiction of the cause of action is by the interposition of a demurrer or answer to the complaint and not by motion to dismiss. *Delaware, Lackawanna & Western R. R. Co. v. New York, Susquehanna R. R. Co.* 67 St. Rep. 784.

The jurisdiction of the court on the ground that both parties were foreign corporations will not be considered on a motion to dismiss for laches of plaintiff. *Moffett, Hodgkins & Clark Co. v. Peoria Water Co.* 64 St. Rep. 410, 83 Hun, 73. A District Court in the city of New York has no jurisdiction of an action between foreign corporations unless the property was situated, or the contract sued upon was made, or the cause of action arose within this State. *Progressive Power Co. v. Wrought Iron Bridge Co.* 14 Misc. 23.

Where in an action against a foreign corporation the status of plaintiff as a foreign corporation is conceded or otherwise ascertained, and the case does not present one of the exceptions under § 1780, the courts of this State cannot proceed to adjudge the rights of the litigants, but must dismiss the action. *Gundlin v. Hamburg-American Packet Co.* 31 Abb. N. C. 437, 8 Misc. 291, 28 Supp. 573, 59 St. Rep. 208, citing *Perry v. Erie Transfer Co.* 28 Abb. N. C. 430; *Davidsburg v. Knickerbocker Life Ins. Co.* 90 N. Y. 526; *Robinson v. Oceanic Steam Navigation Co.* 112 N. Y. 315.

An agreement made in New York to render services though it did not fix the price is, nevertheless, a contract within § 1780, providing that an action against a foreign corporation may be maintained for the breach of a contract made within the State. *Robeson v. Central Railroad Co.* 76 Hun, 444, 28 Supp. 104, 59 St. Rep. 180. Where plaintiffs are residents of the State of New York they are expressly authorized to sue a foreign corporation for any cause of action. *People v. American Loan & Trust Co.* 43 St. Rep. 332; s. c. 17 Supp. 76. Resident stockholders of a foreign corporation may sue another foreign corporation and compel it to perform its agreements and issue certain of its capital stock in the company of which plaintiffs are stockholders, or in case of its failure to issue the same, then to recover damages. *Babcock v. Schuykill, etc. R. R. Co.* 9 Supp. 845.

An attachment against a foreign corporation for a cause of

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action which does not appear to have arisen in the State will be vacated where the affidavit therefor fails to show that plaintiff was a resident of the State. *Oliver v. Walter Heyward Chair Manufacturing Co.* 10 Supp. 770. Under a bill of lading issued in a foreign country for goods to be transported therefrom to New York, an action for damages to the goods in course of transportation is upon a cause of action arising in New York, within subdivision 3 of § 1780. *Robertson v. National Steamship Co.* 14 Supp. 313.

SUB. 3. WAIVER OF MISNOMER AND PROOF OF CORPORATE EXISTENCE. §§ 1776, 1777.

§ 1776. When proof of corporate existence unnecessary.

In an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.

§ 1777. Misnomer, when waived.

In an action or special proceeding, brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleading in the defendant's behalf.

Misnomer is waived by pleading *nul tiel* corporation. *Trustees, etc. v. Tryon*, 1 Duer, 451. A misnomer of a corporation is waived unless pleaded, and this as well when the corporation suffers a default as when it answers. *Whittlesy v. Frantz*, 74 N. Y. 456.

Under § 1776, unless the answer contains an affirmative allegation that plaintiff is not a corporation, a statement in the answer that defendant has no knowledge or information sufficient to form a belief as to the incorporation alleged in the complaint, does not put plaintiff to proof of such incorporation. A general rule of pleading that it is a sufficient denial to aver that the defendant "has no knowledge or information sufficient to form a belief" as to the fact traversed, is qualified by this section, so that proof is not necessary as to plaintiff's incorporation under such a denial. *East River Electric Light Co. v. Clark*, 18 Supp. 463; s. c. 45 St. Rep. 635. To same effect, *Crown Point Iron Co. v. Fitzgerald*, 14 St. Rep. 427; *Tacudsticksfabriks Aktiebolaget Vulcan v. Myers*, 58 Hun, 161; s. c. 11 Supp. 663; s. c. 34 St. Rep. 122; *McElwee Manufacturing Co. v. Trowbridge*, 68 Hun, 28; s. c. 52 St. Rep.

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64, 22 Supp. 674; *Dry Dock, etc. R. R. Co. v. North & East River R. R. Co.* 3 Misc. 61; s. c. 51 St. Rep. 771, 22 Supp. 557; *Miller v. Jones*, 67 Hun, 281; s. c. 22 Supp. 90; s. c. 51 St. Rep. 361.

An allegation denying on information and belief that the plaintiff is a banking association by the name set forth in the complaint, followed by a second upon averment on information and belief that there is no such corporation as the one described in the complaint, is not an affirmative allegation that the plaintiff is not a corporation, and it raises no issue upon the question. *First National Bank v. Slattery*, 4 App. Div. 421, citing *Concordia v. Reed*, 93 N. Y. 474.

The statute, before the Code, did not apply to a foreign corporation, which must prove its corporate existence when a general denial was interposed. *Waterville Man'f'g Co. v. Bryan*, 14 Barb. 182. A plaintiff is not bound to prove the incorporation of a defendant, unless a verified answer is served containing a verified affirmative allegation that the defendant is not a corporation. *Bengston v. Thingvalla S. S. Co.* 3 Civ. Pro. R. 263. An allegation in a complaint that the plaintiff is a domestic corporation is not admitted by demurrer, if the incorporation depends upon public acts, of which the court are bound to take notice, for in such case these acts may be read as if embodied in the complaint, and the allegation that the defendant is a corporation is a mere allegation of law. *Walsh v. Trustees, etc.* 96 N. Y. 427. Where the complaint does not aver that the plaintiff is a corporation created under a statute of the State of New York, proof of its corporate character will be required when put in issue. *Ansonia Brass, etc. Co. v. Conner*, 13 Week. Dig. 87.

An answer which alleges that defendant has no knowledge or information sufficient to form a belief as to whether plaintiff is a corporation, does not put plaintiff upon proof of its corporate existence within this section, as it is not an affirmative allegation that it is not a corporation. *Dewolf v. Watterson*, 35 Hun, 111; *Concordia, etc. Association v. Reed*, 93 N. Y. 474; *First National Bank, etc. v. Clark*, 22 Week. Dig. 569. Where there is no allegation in the complaint that defendant is a corporation, no specific denial is necessary in the answer, and a general denial puts that question in issue. *Brooks v. Farmers', etc. Creamery*, 21 Week. Dig. 58. A defendant is estopped from denying corporate existence of plaintiff by contracting with it in its corporate name.

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East River Bank v. Rogers, 7 Bosw. 493; *Connecticut Bank v. Smith*, 9 Abb. 168; *Loaners' Bank v. Jacoby*, 10 Hun, 143. In proceedings by a railroad company to acquire title to lands the petition averred the due incorporation of the petitioner; a counter affidavit denied any knowledge or information sufficient to form a belief as to the truth of said averment. *Held*, that, considering this simply as an affidavit, it was not a denial of the averment; that treating it as an answer, there was no such denial as put the petitioner to proof of its incorporation under this section; that conceding the land owners might, without a formal denial, disprove the fact, the burden was upon them of proving the petitioner was not a corporation. *Matter of N. Y., L. & W. R. R. Co.* 99 N. Y. 12. A corporation may be so defective as to be incapable of supporting its incorporation as against the people, but be sufficient by user to be held a corporation *de facto* as to subscribers to its capital. *Buffalo, etc. R. R. Co. v. Cary*, 26 N. Y. 75; *Cayuga Lake R. R. Co. v. Kyle*, 64 N. Y. 185.

An allegation in a complaint that the plaintiff is a corporation is admitted by failure to affirmatively deny it in the answer. *Platt & Washburn Refining Co. v. Hepworth*, 13 Civ. Pro. R. 122. In *Second Methodist Episcopal Church in Greenwich v. Humphrey*, 49 St. Rep. 467, it was held necessary, where the allegation of incorporation was denied upon information and belief, that the plaintiff should prove the existence of the corporation upon the trial.

Where an action is brought against a corporation, and the answer does not deny that the defendant is a corporation, plaintiff need not prove an incorporation. *Goldsmith v. The Wells Co.* 86 Hun, 489, 67 St. Rep. 550. A denial upon information and belief that plaintiff is a corporation, does not require plaintiff to prove its corporate existence. *Lamson Store Service Co. v. Conyngham*, 11 Misc. 428, 65 St. Rep. 271, citing *Vulcan v. Myers*, 58 Hun, 162; *Concordia Savings & Aid Ass'n v. Reed*, 93 N. Y. 474; *Bengston v. Thingvalla Steamship Co.* 31 Hun, 96. The objection that the plaintiff did not prove its incorporation by the best evidence cannot be made where defendant did not answer. *Kingston Carriage Co. v. Hutton*, 69 St. Rep. 190, citing *In re New York, L. & W. R. R. Co.* 99 N. Y. 12; *McElwee Mfg. Co. v. Trovbridge*, 68 Hun, 28, 52 St. Rep. 64.

Section 1776 has no application to a proceeding instituted by

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a corporation for the condemnation of land, but an answer in such a proceeding, which contains a denial of knowledge or information by the defendant sufficient to form a belief with regard to petitioner being a corporation, raises an issue which must be met by proof. *Matter of Broadway and Seventh Ave. Ry. Co.* 73 Hun, 7, 57 St. Rep. 108. A denial of knowledge or information sufficient to form a belief as to the allegations as to incorporation of plaintiff, does not require proof of incorporation. *Martin Cantine Co. v. Warshauer*, 7 Misc. 412, 23 Civ. Pro. R. 379, 58 St. Rep. 569.

A mere denial in any form is not sufficient to raise an issue on the question of the plaintiff's existence as a corporation. The answer must contain an affirmative allegation to the effect that the plaintiff is not a corporation. *United States Vinegar Co. v. Schlegel*, 62 St. Rep. 826, 143 N. Y. 537, 38 N. E. Rep. 729, affirming 51 St. Rep. 453. In *People ex rel. Haberman v. James*, 5 App. Div. 412, it was held that the complaint was properly dismissed as to the defendant, The Central Stamping Company, upon the ground that the corporation was not a proper party to the action, it being claimed that the life of the corporation had ceased before the action was brought, and that in such case its assets should be held by the directors as trustees for its creditors and stockholders.

SUB. 4. RESTRICTIONS ON DEFENCE BY CORPORATION IN SUIT ON NOTE. § 1778.

§ 1778. Action against a corporation upon a note, etc.

In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, an order, extending the time to answer or demur, shall not be granted, except by the court, upon notice to the plaintiff's attorney. In such an action, unless the defendant serves, with a copy of his answer or demurrer, a copy of an order of a judge, directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney, pursuant to his demand therefor; or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete.

Section 1778 is a substitute for §§ 8, 9 and 10, 2 R. S. (Edm. ed.) 479, and in remodeling them the codifiers have attempted to adapt them, as they state, to the present practice, and to preserve intact the description of cases to which the same apply;

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also to provide a more effectual method of preventing delay where there is no real defence. They cite *Tyler v. Aetna Ins. Co.* 2 Wend. 280. This section applies in all cases; *Hutson v. Morrisania Steamboat Co.* 64 How. 268; but is in derogation of the common law, and must be strictly construed, and is not available where another cause of action is also pleaded. *Bradley v. Albe-marle, etc. Co.* 2 Civ. Pro. R. 50. This section requires the court to enter an order directing the issues by the pleadings to be tried, in case it deems the defence a meritorious one; see *Hutson v. Morrisania Steamboat Co.* 12 Abb. N. C. 278; but this does not, of necessity, imply that the court has determined that the pleadings are unobjectionable, or that each of the issues are valid. Such an order does not prejudice plaintiff's right to make a motion as he may be advised. *Beaumont v. Diccks, etc. Co.* 5 Civ. Pro. R. 275.

The Legislature intended the order should be served within the time within which the answer is due, and hence the time within which such an order must be served in the Marine Court is limited to six days. *Schlegel v. Bottling Co.* 2 Civ. Pro. R. 393. The provisions of the Code of Procedure providing that in an action against a foreign or domestic corporation, upon a promissory note or other evidence of debt for the absolute payment of money, the plaintiff may take judgment as upon a default unless defendant serves a copy of an order required by this section, applies to a municipal corporation, and this, although by its charter it is authorized to sue and be sued, to complain and defend. Such a provision conveys no special right not common to corporations in general, and is constitutional. It seems that the decisions of a judge, refusing to the corporation an order for the trial of issues, is appealable. *Moran v. Long Island City*, 101 N. Y. 439, reversing 38 Hun, 122. A policy of insurance, either life or fire, is not within this section, although the policy is due; the section applies only to instruments which admit on their face a debt payable absolutely. *McKee v. Metropolitan L. Ins. Co.* 25 Hun, 583; *N. Y. Life Ins. Co. v. Universal L. Ins. Co.* 88 N. Y. 424; *Tyler v. Aetna Fire Ins. Co.* 2 Wend. 280; *Ogle v. Knickerbocker L. Ins. Co.* 4 Law Bull. 22. The bond of a corporation is none the less an absolute obligation under this section, by reason of a provision therein that it may, at its option, pay the debt acknowledged to be due in stock, the option not

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having been exercised. *Clark v. Hydrogen Co.* Abb. Ann. Dig. 1884, p. 266.

Where a corporation, demurred to a complaint, but did not serve with the demurrer copy of the order of the judge directing that the issues raised by the demurrer should be tried, it was held a motion to open the default was properly denied under provisions of this section. *Ford v. Binghamton Hydraulic Power Co.* 54 Hun, 452; s. c. 28 St. Rep. 294, affirmed, 121 N. Y. 664, distinguishing *Shorer v. Times Printing and Publishing Co.* 53 Hun, 88; s. c. 17 Civ. Pro. R. 181, affirmed, 24 St. Rep. 868; s. c. 119 N. Y. 483, which holds that the provisions of this section requiring a judge's order to accompany the answer of the defendant, which is a corporation, does not cover case where the corporation is liable only as an indorser of the note, but is to be confined strictly to actions upon instruments which admit on their face the existing debt payable absolutely, citing *N. Y. Life Ins. Co. v. Univ. L. Ins. Co.* 88 N. Y. 424. In an action against a corporation upon its promissory note, service with the answer of a copy of an order directing trial of the issues is a full compliance with this section. No order for the trial of new issues raised by the answer to an amended complaint need be served. *Edward Barr Co. v. Kuntz & Co.* 18 Abb. N. C. 476.

ARTICLE II.

JUDICIAL SUPERVISION OF A CORPORATION AND OF THE OFFICERS AND MEMBERS THEREOF. §§ 1781, 1782, 1783.

SUB. 1. ACTION BY ATTORNEY-GENERAL.

2. ACTION BY CREDITOR, STOCKHOLDER OR TRUSTEE.

The provisions of the Code of Procedure on this subject are taken from 2 R. S., §§ 34, 35, 36, revised and amended.

§ 1731. Action against directors, etc., of a corporation, for misconduct.

An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

1. Compelling the defendants to account for their official conduct, in the management and disposition of the funds and property committed to their charge.
2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost or wasted by a violation of their duties.

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3. Suspending a defendant from exercising his office where it appears that he has abused his trust.

4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

5. Setting aside an alienation of property, made by one or more trustees, directors, managers, or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

§ 1782. By whom action to be brought.

An action may be brought, as prescribed in the last section, by the attorney-general in behalf of the people of the State, or except where the action is brought for the purpose specified in subdivision third or fourth of that section, by a creditor of the corporation, or by a trustee, director, manager or other officer of the corporation, having a general superintendence of its concerns.

§ 1783. This article, how construed.

This article does not divest or impair any visitatorial power over a corporation which is vested by statute in a corporate body or a public officer.

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This statute provides a remedy for the unlawful alienation of property by a corporation, where the alienee knew its purpose, by an action against the officers chargeable with the wrong, to set aside the alienation. *Kelsey v. The Pfandler Process Co.* 9 St. Rep. 563. An action brought by the people to set aside an alienation of property, made by one or more officers of a corporation, contrary to a provision of law, or for a purpose foreign to its lawful business, implies the existence of a corporation. *People v. O'Brien*, 45 Hun, 519. The attorney-general, on behalf of the people, may maintain an action under subdivisions 1 and 2 of § 1781, and under § 1808; he must bring such an action where the public interests require it to be brought, and when the president of a railroad company makes a contract with himself for the construction of the railway, where he obtains all the securities, stocks and bonds, under pretense of paying the nominal contractor, when, as chief engineer, he makes to himself certificates for work done, and then, as president, pays himself many hundreds of thousands of dollars in advance of what the contractor is en-

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titled to, the attorney-general must bring an action; and it is no defence to such an action that an action has been brought by a stockholder under § 1781. *People v. Bruff*, 60 How. 1. An action brought by one director to compel others to account is not a bar to an action by the attorney-general. *Keeler v. Brooklyn Elevated R. R. Co.* 9 Abb. N. C. 166.

It was held in *People v. Lowe*, 47 Hun, 577, that the attorney-general is authorized by §§ 1781 and 1782 to bring, in behalf of the people, actions to compel the officers of corporations to account for their official conduct in the management and disposition of the fund and property committed to their charge and also to procure a judgment suspending them from office where it appears they have abused their trust, although it was held that a judgment dissolving the corporation could not be obtained in such an action because leave had not been granted as required by § 1798. On appeal, 117 N. Y. 175, the judgment is reversed upon other grounds. Earl, J., however, discusses very fully the right of the attorney-general to bring an action in aid of individuals and private rights, concluding the opinion, however, with the statement that the court is not agreed as to the authority of the attorney-general to maintain the action on the facts alleged, and, therefore, it does not determine whether he had such authority. S. C. 27 St. Rep. 138.

In *People v. Ballard*, 56 Hun, 125, it was held that the attorney-general has no authority to bring an action in the name of the people for the settlement of strictly private disputes between the trustees and a portion of the stockholders of a private corporation not charged with any public duties. Where it appears that an action has been brought in the name of the people by the attorney-general, not upon the relation or for the benefit of creditors of a corporation, but solely in the interest of certain stockholders who are dissatisfied with the action taken by its trustees, it is competent for the court to inquire into the question as to whether there is an enforceable public interest involved in the action. S. C. 29 St. Rep. 926. It was held, same case, at Special Term, 3 Supp. 845, that independently of the statute, a court of equity has no jurisdiction at the suit of the people to compel officers of a private business corporation to refund property of the corporation illegally disposed of, and the fact that the action was brought on the relation of a trustee is insufficient where

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neither the complaint nor the title of the action shows that it was so brought.

But on appeal to the Court of Appeals, 134 N. Y. 269; S. C. 48 St. Rep. 166, it was held, Brown and Landon, JJ., dissenting, that an action might be brought by the attorney-general in the name of the people without relator against a domestic business corporation and its trustees to remove the latter from their position for misconduct and to compel them to account for and pay over to the corporation the value of property belonging to it transferred to them by others in violation of their duty, whenever he deems that the action can be maintained and the interests of the public will be promoted thereby. The question as to whether the public interests require to bring such an action, is committed by the statute to the absolute discretion of the attorney-general, and may not be made the subject of inquiry by the court on trial of the action. Subsequently a motion was made in the Court of Appeals, Second Division, for a re-argument upon the authority of *Skinner as Trustee v. Smith*, 134 N. Y. 240, where the action was brought under these sections to set aside alienations of property made or authorized by individual defendants to those who were at the same time a majority of the trustees of the corporation and also to compel them to account for all sums and property received under such alienation. The motion was denied for reasons given. *People v. Ballard*, 136 N. Y. 639. In the report of *Skinner v. Smith*, at General Term, 31 St. Rep. 448, it is said that action was brought under § 1781 of the Code which is "sufficiently comprehensive to justify its commencement."

Where the complaint in an action alleges waste of corporate assets, wrong-doing and mismanagement upon the part of three of the directors of a corporation and of others confederating with them, and seeks an accounting from such directors and a restraint of the alienation of the corporate property, a receiver of the property of the corporation may be appointed before trial, and the receivership may be continued after the trial to carry the judgment into effect. An action of this character authorized by §§ 1781 and 1782 of the Code of Civil Procedure, does not contemplate the distribution of the corporate assets among creditors nor a dissolution of the corporation. *Halpin v. Mutual Brewing Co.* 91 Hun, 220. The provisions of § 1986 relative to an action by the attorney-general requiring a relator to give satisfactory

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security, and giving the attorney-general compensation for his services, applies only to cases where the action is instituted in the name of the people to protect or secure the interests of individuals, like the actions specified in §§ 1781, 1784 and 1785, and in all cases where mere private interests are sought to be promoted by the commencement of the action by the attorney-general in the name of the people. *People v. Buffalo Stone & Cement Co.* 131 N. Y. 140; S. C. 42 St. Rep. 753. Section 1781 does not in terms or otherwise affect or take away the duty of the attorney-general to proceed under the provisions of the Revised Statutes now incorporated in the Executive Law or at common law, by prosecuting such suits as are necessary to protect the interests of the people. *People v. Powers*, 83 Hun, 449.

SUB. 2. ACTION BY CREDITOR, STOCKHOLDER OR TRUSTEE.

The term "creditor," as used in §§ 1781 and 1782, means a judgment creditor, and not a creditor at large; a creditor at large cannot maintain an action for the relief allowed by § 1781. *Belknap v. North Am. Life Ins. Co.* 11 Hun, 282; *Cole v. Knickerbocker Life Ins. Co.* 23 Hun, 255; *Paulsen v. Vansteenburg*, 65 How. 342. It is said in *Ramsey v. Eric R. R. Co.* that if, in any case, a creditor can maintain an action of this character, he must state the nature of his claim in the complaint, how it arose and the amount due, and demand payment before suit, and suspension should not be ordered unless proof of misconduct is clear and positively sworn to. By § 1809 it is provided injunction in such case can only be granted by the court on notice; and by § 1811, that trustees can only be suspended or removed in case of final judgment. Where the property of a corporation has been divided by the stockholders, a judgment creditor may maintain an action against a stockholder to reach what he received; he need not sue in behalf of all or make all the stockholders parties. *Hastings v. Drew*, 50 How. 254; *Bartlett v. Drew*, 57 N. Y. 587, affirming 60 Barb. 648. Profits made by the president of a corporation who owned a majority of the stock from a lease of all its property to him may be reached. *Conro v. Port Henry Iron Co.* 12 Barb. 27. See *Van Cott v. Van Brunt*, 82 N. Y. 535. If an insurance company insolvent in fact, but not known by its officers to be so, reinsures a portion of its policies, this is a transfer which makes the directors liable to the other policy-holders, and the receivers may main-

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tain an action. *Casserty v. Manners*, 9 Hun, 695. An executive committee of a joint-stock company cannot vote themselves money in addition to the regular compensation for past extra services, nor in consideration of their retirement, and a receiver will be appointed to recover such money. *Blatchford v. Ross*, 54 Barb. 42. Bank officers who abuse or transcend their powers are as much liable as any private agent is to his employer. *Austin v. Daniels*, 4 Den. 299. But directors are not liable for breach of fidelity by subordinates unless they have knowledge of bad character; they are liable only for neglect of ordinary care. *Scott v. Depyster*, 1 Edw. 513. Trustees who audit a bill in favor of one of their number whose presence is necessary in order to constitute a quorum are liable to stockholders. *Butts v. Wood*, 37 N. Y. 317. In an action by a corporation against officers for damages arising from violation of duty, no laches short of the statute of limitations is a bar. *Ilion Bank v. Carver*, 31 Barb. 230. An action may be maintained by a stockholder in a corporation to recover for fraudulent mismanagement; *Cazcaux v. Mali*, 25 Barb. 578, approved, *Bruff v. Mali*, 36 N. Y. 200; or to prevent the misappropriation of the funds of the corporation. *Carpenter v. N. Y. & N. H. R. R. Co.* 5 Abb. 277. The corporation should be a party to such an action. *Wells v. Jewett*, 11 How. 242; *Gardner v. Pollard*, 10 Bosw. 674; *Smith v. Rathbun*, 66 Barb. 402. It was formerly doubted whether such an action could be brought against one stockholder; *Smith v. Rathbun*, 66 Barb. 402; *Simmons v. Sisson*, 26 N. Y. 264; and also held that the action must be brought in the name of the corporation unless it refused after request. *Gray v. New York, etc. Steamboat Co.* 3 Hun, 383; *Taylor v. Earle*, 8 Hun, 1; *O'Brien v. O'Connell*, 7 Hun, 228; *Greaves v. Gouge*, 69 N. Y. 154.

Although, in general, a stockholder must request a corporation, or its officers, to sue before he can sue on its behalf, yet, where it is shown that the corporation is under the control of those who must be defendants in the suit, such demand is not required. *Sheridan v. Sheridan Electric Light Co.* 38 Hun, 396, *Currier v. N. Y., W. S. & B. R. R. Co.* 35 Hun, 355; *Kelscy v. Sargeant*, 40 Hun, 150; *Anderton v. Wolf*, 41 Hun, 571. But he must show either that the affairs of the corporation remain in the hands or under the control of officers who are about to permit a sacrifice of the property, or who are parties to such a proceeding. *Spencer*

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v. Clark, 22 Week. Dig. 490. A stockholder may maintain an action to prevent the payment of money by the corporation on an unlawful agreement. *Leslie v. Lorillard*, 40 Hun, 392. A stockholder is not deprived of the right to bring an action for illegal acts of the corporation, by reason of the fact that he did not purchase his stock till after the commission of the acts complained of. *Frothingham v. Broadway, etc. R. R. Co.* 9 Civ. Pro. R. 304.

The statute sanctions an action to restrain the officers of a corporation from paying to themselves salaries fixed by them in their own favor, and to compel them to refund the amount already paid, and a previous demand to bring the action is unnecessary when the corporation is wholly under the control of the directors, whose wrong is complained of. *McNaughton v. Osgood*, 41 Hun, 110, citing *Brinckerhoff v. Bostwick*, 88 N. Y. 59, as to the last proposition. Where a stockholder brings an action on behalf of himself and all other stockholders against a trustee, and the corporation alleging that the trustee has converted its money and property to his own use, and the corporation declines, upon application of plaintiff, to bring an action for its recovery, and is made a defendant, it is in proper form, although no other damage is alleged as accruing to plaintiff. The decree, if the cause goes to final judgment, will adequately protect all interested. The action is properly brought. *Carpenter v. Roberts*, 56 How. 216.

If through gross negligence and inattention the directors of a corporation suffer the corporate funds to be lost or wasted, they are liable for the loss so sustained. An action may be brought by the receiver of a national bank to recover such damages in the State courts. In case the receiver is one of the directors chargeable with neglect of duty, such action may be maintained by the stockholders, or by one or more of them. The bank and the receiver are necessary defendants in such an action. But it is not necessary to allege in the complaint a direction from the controller, or a demand upon him, and a refusal to direct the receiver to bring the action, or a refusal by the receiver to sue. *Brinckerhoff v. Bostwick*, 88 N. Y. 52, reversing 23 Hun, 237. Such an action is really the action of all the stockholders, and the judgment is for the benefit of all. *Brinckerhoff v. Bostwick*, 99 N. Y. 194, reversing 34 Hun, 352.

Where one who, by contract with a corporation, was to have

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the management of its affairs for one year, before the close of the year brought an action to set aside an alleged unlawful alienation of its property made by its trustees and officers, *held*, it was authorized by the preceding sections. In such an action a trustee, who was not in any way connected with the unlawful alienation, is not a necessary defendant. *Beecher v. Shieffelin*, 4 Civ. Pro. R. 230. Where three of the four trustees, the pastor and sexton of a corporation, formed under chapter 60, Laws of 1813, conspired to change the ecclesiastical connection of such corporation, and divert its temporalities to another denomination, *held*, that one legal trustee might bring an action in the name of the corporation to restrain such diversion. *First Ref. Pres. Church v. Bowden*, 16 Week. Dig. 387. But the court can only interfere with a corporation or its officers on some of the grounds mentioned in the statutes. *Belmont v. Erie Railway Co.* 52 Barb. 637; *Ferris v. Strong*, 3 Edw. 127; *Verplank v. Mercantile Ins. Co.* 1 Edw. 84. It was said, however, in *Kniskern v. Lutheran Church*, 1 Sandf. Ch. 439; *Bowden v. McLeod*, 1 Edw. 588; *Baptist Church v. Witherell*, 3 Paige, 296, that chancery had power to compel trustees to execute their trusts independent of statute.

A complaint which alleges that defendant was a domestic corporation, that plaintiff was a judgment creditor thereof, that the defendant company delivered a quantity of bonds to some of its stockholders — also defendants — for purposes foreign to its lawful business, as was well known to the latter; that to secure these bonds, a mortgage was executed to him of all the real and personal property of the company, which mortgage was made in contemplation of insolvency, that a few days after, the mortgagees, to prevent creditors of the company from obtaining their lawful demands, took possession of the goods of the company and sold or were about to sell them, applied proceeds to their own use and the use of the holders of said bonds; that thereafter the mortgage was foreclosed and a judgment recovered, directing the sale of the real estate; that certain directors and stockholders procured the incorporation of a new corporation and that all these proceedings were part of a fraudulent plan to transfer the property of the defendant to the new corporation for a nominal price and to defeat the rights of the creditors, shows facts constituting a cause of action under §§ 1781 and 1782. *Phoenix National Bank v. Cleveland Company*, 11 Supp. 873, S. C. 34 St. Rep. 498.

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By §§ 1781 and 1782, any one of the trustees of a corporation can bring and maintain an action to compel another trustee to account to the corporation or to its creditors or stockholders for money or property of the corporation illegally diverted by the defendant trustee from the corporate purposes. *Gildersleeve v. Lester*, 68 Hun; 532, S. C. 52 St. Rep. 559; *Piza v. Butler*, 90 Hun, 254. Where the complaint in an action against the directors of a corporation alleged plaintiff was a creditor and stockholder of the company, that the president had appropriated the property of the company and designs to remove all its property from the county where it did business, that he is insolvent, that the company ceased to do business and its assets will not pay its debts, while the answer denied these charges and the averment that plaintiff was a creditor or stockholder, it was held that an injunction *pendente lite* was proper. *Hoyt v. Malone*, 31 St. Rep. 739; S. C. 9 Supp. 877. See *Piza v. Butler*, 90 Hun, 254.

An examination of defendant before trial will not be permitted in an action against an officer of a corporation by a person who claims to be a stockholder, for an accounting and appointment of a receiver on the ground of mismanagement of the corporate affairs, and waste of assets by defendant, where it appears that plaintiff's stock has been regularly transferred to defendant on the books of the company, though plaintiff asserts that the transfer was without consideration and upon conditions that were never performed, and that plaintiff must first establish his title to the stock. *Lawson v. Stanley*, 15 Supp. 707.

The rule that an action against an officer of a corporation for misappropriation of corporate funds, or for damages for waste or sequestration of corporate property, through misfeasance in office or violation of duty, cannot be brought by a stockholder unless the corporation refuses to sue, but in case of such refusal the corporation must be made defendant, is not affected by the provisions of § 1782. Nor can such an action by a stockholder against an officer of the corporation, for damages, be maintained as an action in tort against an individual, acting solely on his own responsibility. *Stromeyer v. Combes*, 15 Daly, 29; S. C. 18 St. Rep. 154. In *Thompson v. Stanley*, 20 N. Y. Supp. 317, it is held that the fact that a corporation has done no business for some years, and has no property except a claim against defendant for proceeds of the corporation's property, alleged to have been misappropriated by

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defendants intentionally, does not give the stockholder the right to maintain an action, on his own behalf, to recover directly from defendant his proportionate share of the funds alleged to have been misappropriated.

While a minority stockholder, in the absence of waste, mismanagement or fraud, has no standing as to title, yet a complaint which alleges a general misapplication of the funds by persons who have obtained control of the corporate management, states a cause of action. Where a corporation is under the control of alleged wrongdoers, it is unnecessary for the stockholder to demand that an action alleging a misappropriation of its funds be brought by the committee. *Sage v. Culver*, 71 Hun, 42; S. C. 54 St. Rep. 297; S. C. 24 N. Y. Sup. 514. When the officers of a corporation are alleged to be themselves identified with and agents in an unlawful or wrongful act, which is to be the subject of inquiry or redress, it is not necessary that the application be made by the shareholders to them, to bring action before suit may be maintained by the shareholders themselves. An action for the winding up of the affairs of the company, upon its dissolution, is maintainable by shareholders in their own rights and interests, and it is not required that application be made first to the officers of the company to bring the action. *Myers v. Scott*, 20 St. Rep. 35; S. C. 2 Supp. 753.

Where plaintiff, the stockholder in a corporation, was informed by its president, whom he requested to take action against two of the directors for misconduct and neglect of duty, that he had resigned the presidency two years before, while in fact there was no evidence that he ever had resigned, and the two directors were most active in the management of the company, it was held these facts were sufficient to entitle plaintiff to sue as a stockholder in his own name. *Averell v. Barber*, 6 Supp. 255. See note at end of case on right of stockholder to sue in such case.

In *Zeigler v. Hoagland*, 52 Hun, 385; S. C. 5 Supp. 305, an action by a stockholder to restrain waste by a corporation was sustained. Also in *Gamble v. Queens County Water Co.* 52 Hun, 166; S. C. 23 St. Rep. 409, 5 Supp. 124, it was held that a corporation might be restrained from issuing certain stock and bonds; reversed, however, 123 N. Y. 91, where it was held that as to questions of mere administration or of policy, as to which there is an honest difference of opinion among shareholders, the will of the majority

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should govern, and so the court cannot be justified in interfering, even in doubtful cases where the action of a majority might be susceptible of different constructions. To warrant the interposition of the court, where the proposed action is within the corporate powers, a case must be made out which plainly shows that such action is so opposed to the true interests of the corporation itself as to necessarily lead to the inference that none of those acting could have been influenced by an honest desire to secure such interests, but that they must have acted with intent to subserve some outside purpose regardless of the consequences to the company and in a manner inconsistent with its interests; that a shareholder has a legal right to vote upon a measure, even though he has a personal interest therein separate from the other shareholders; he represents himself and his own interests solely, and in no sense acts as a trustee or representative of others. It seems, if such action should result in a wrong or fraudulent construction of the rights of the minority, it might be submitted to the scrutiny of a court of equity, at the suit of the minority shareholders, one suing in his own behalf and that of all others and the corporation being made a party defendant.

An appeal to equity on behalf of a stockholder to be relieved from acts of the directors of the corporation, where the acts complained of were within their powers and apparently uninfluenced by the corrupt motives or personal interests adverse to those of the stockholders, should at least be justified by some showing that the acts were improper within the belief of a fair proportion of the body of the stockholders. *Beveridge v. N. Y. R. R. Co.* 112 N. Y. 1, 20 St. Rep. 962. If the object of an action is to compel the officers of a corporation to account for official misconduct, and not to procure an examination of a long account, a reference cannot be ordered to take and state an account between the defendants and the corporation of which they are officers, until there is some proof to sustain the allegation that there has been official misconduct, and the determination of the facts has been reached and put in the form of an interlocutory judgment directing an accounting. *Stokes v. Stokes*, 87 Hun, 152, 67 St. Rep. 760.

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Precedent for Complaint.

SUPREME COURT — QUEENS COUNTY.

Paul Halpin

agst.

The Mutual Brewing Company, Matthew Coleman, Thomas D. Coleman, Patrick Coleman, Michael T. Coleman, The Coleman Brewing Company, Frederick Eder, Edward Joyce, John N. Hayward, Christian F. Tietjen, Trustee of John N. Hayward, T. D. Coleman & Brother, Denis Coleman, Louis W. Duesing and George S. Mitchell.

The complaint of the plaintiff against the above-named defendants alleges:

First. That the plaintiff owns one hundred and twenty-five shares of the capital stock of the defendant, The Mutual Brewing Company, of the par value of one hundred dollars each, and that he has owned said stock since the 20th day of December, 1890; that he now is and has been since the 1st day of February, 1892, a director of said company, and was elected vice-president of said company on the 1st day of February, 1892, and re-elected on the 8th or 9th day of January, 1893, and that he has been since the 1st day of February, 1892, vice-president of said company and acting as such, and that he still is such vice-president.

Second. That the defendant The Mutual Brewing Company is a domestic corporation organized under the Laws of the State of New York, and carries on the business of brewing and selling beer. That the brewery of said defendant is situated at College Point, Queens county, New York, which is the principal place of business of the said defendant, and that it has an office in the city and county of New York for the transaction of business, where the books of account are kept, and also the papers of said defendant.

Third. That the defendant The Mutual Brewing Company was organized on the 5th day of March, 1887, under the name of The Fitzgerald Brewing Company, by Edmund Fitzgerald, Patrick J. Fitzgerald, Frank Clark, Bernard T. Kearns and Edward Joyce, with a capital stock of one hundred thousand dollars, consisting of one thousand shares of the par value of one hundred dollars each.

Fourth. That the plaintiff alleges upon information and belief that immediately after the organization of The Mutual Brewing Company under the name of The Fitzgerald Company, Edmund Fitzgerald and Patrick Fitzgerald became the owners of five hundred shares of the capital stock of the said company; Bernard T. Kearns of two hundred and fifty shares; Edward Joyce and Frank Clark each of one hundred and twenty-five shares, and they continued to hold said stock, and as officers and trustees, control and manage the business of said company until in or about August, 1889.

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Fifth. That the plaintiff alleges upon information and belief that seventy thousand dollars of the capital stock of the defendant The Mutual Brewing Company, then The Fitzgerald Brewing Company, issued in payment of the land and buildings at College Point, Queens county, New York, and thirty thousand dollars in cash, and that the said defendant at that time also borrowed the sum of forty thousand dollars which was secured by a mortgage on said real estate, which said sum was spent in betterments and improvements on the brewery buildings and in repairing the plant and machinery and furnishing additional machinery and utensils used in the manufacture of beer.

Sixth. That the plaintiff alleges upon information and belief that in or about the month of August, 1889, when the defendant first acquired any interest in The Mutual Brewing Company, then The Fitzgerald Brewing Company, the company was doing a large, profitable and progressive business, that its brewery and plant were in a good condition, the company well thought of by its customers and well equipped for increasing its trade or business.

Seventh. That the plaintiff alleges upon information and belief that the defendant The Coleman Brewing Company, is a domestic corporation, organized under the Laws of the State of New York, and at the time herein mentioned was and still is carrying on the business of the manufacture and sale of malt and the brewing and sale of ales and porter, and that the place of business of the said defendant was and is in the city and county of New York.

Eighth. That the plaintiff alleges upon information and belief that the defendant The Coleman Brewing Company was organized on or about November 24th, 1888, by the defendant Matthew Coleman, Patrick Fogarty and Bartholomew A. Greene, under the name of Fogarty & Coleman Brewing Company, with a capital stock of one hundred thousand dollars, consisting of two thousand shares of the par value of fifty dollars each; that on or about June 4th, 1889, the name of said defendant was, by an order of the Supreme Court, changed to The Coleman Brewing Company.

That from or about April, 1889, and prior to August, 1889, and since then and up to the present time, the defendant, Matthew Coleman, has been and still is the owner of more than one-half of the capital stock of the defendant, The Coleman Brewing Company, is president and treasurer, and has had and still has full control and management of the business of said company.

Ninth. That the plaintiff alleges, on information and belief, that the defendants Thomas D. Coleman, Patrick Coleman, and the said Matthew Coleman, at the time in this complaint mentioned, were partners under the firm name of T. D. Coleman & Brothers, and carried on business of buying and selling hops and malt, their place of business being at the city of Albany, New York.

Tenth. That the plaintiff alleges, on information and belief, that at the time in this complaint mentioned the defendants Thomas D. Coleman, Patrick Coleman, Matthew Coleman and Michael T. Coleman, were stockholders and directors in The Coleman Brewing Company and The Mutual Brewing Company, and were familiar with the affairs of the said companies.

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Eleventh. That the defendants Matthew Coleman, Michael T. Coleman and Frederick Eder, now are and have been for more than a year past, directors of the defendant The Mutual Brewing Company, and constitute a majority of the board of directors of said company.

Twelfth. That the defendant Michael T. Coleman is the nephew of the defendant, Matthew Coleman, and that the defendant Frederick Eder is counsel for said company, and also private counsel for the defendant Matthew Coleman.

Thirteenth. That the plaintiff alleges, upon information and belief, that on or about the 1st day of July, 1889, the defendants Matthew Coleman and Edward Joyce entered into an agreement in writing with Edmund Fitzgerald to purchase five hundred shares of the capital stock of the Mutual Brewing Company, and one-third of the capital stock of the New York and College Point Ferry Company for the sum of seventy thousand dollars, provided, upon investigation, the said Matthew Coleman and Edward Joyce were satisfied with the financial responsibilities of said companies. One thousand dollars were paid upon the execution of the contract. The contract was made in the name of Edmund Fitzgerald, Patrick J. Fitzgerald, Edward Joyce and The Coleman Brewing Company, and that the one thousand dollars paid was paid by the check of The Coleman Brewing Company.

Fourteenth. That the plaintiff alleges, upon information and belief, that on or about the 2d day of August, 1889, the agreement of July 1st, 1889, was carried out by the defendants Matthew Coleman and Edward Joyce, who paid the balance, sixty-nine thousand dollars, partly in cash and in notes made by the defendant Matthew Coleman to the defendant Edward Joyce, and by the defendant Edward Joyce to the defendant Matthew Coleman, and endorsed by these defendants Matthew Coleman and Joyce, to the said Edmund and Patrick F. Fitzgerald.

Fifteenth. That the plaintiff alleges, upon information and belief, that by the purchase of the stock of the Fitzgeralds, the defendants Matthew Coleman and Edward Joyce acquired the possession of a majority of the capital stock of the defendant The Mutual Brewing Company, and thereafter, and in August, 1889, Matthew Coleman was elected president of said company, with a board of directors subservient to him, and full control and management of the business and financial affairs of the company was given to the president, and the said defendant Matthew Coleman was at that time president of the Coleman Brewing Company with full control and management of both of said companies since then and up to the present time.

Sixteenth. That the plaintiff, upon information and belief, alleges that on or about the 10th day of September, 1889, the defendants Matthew Coleman and Edward Joyce purchased from the said Bernard T. Kearns two hundred and fifty shares of the capital stock of The Mutual Brewing Company and one-third of the capital stock of the New York and College Point Ferry Company for the sum of forty thousand dollars, part of this to be paid in cash and the balance to be paid by furnishing to the said Kearns ale from the Cole-

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man Brewing Company or beer from the Mutual Brewing Company, and that the cash so paid was obtained from the Mutual Brewing Company through pledging its credit, and that beer of the value of or about twenty-five thousand dollars was supplied to the said Kearns, and that the said defendants Matthew Coleman and Edward Joyce did not pay any of this money.

Seventeenth. That the plaintiff alleges, upon information and belief, that in August, 1889, the brewery and office of the Coleman Brewing Company was at No. West Fourteenth street, New York city, and that the defendants Matthew Coleman and Edward Joyce, with the intent to defraud the creditors and stockholders of The Mutual Brewing Company and appropriate the moneys realized and received in the business of The Mutual Brewing Company to their own use, and with the money so received and moneys obtained upon the credit and paper of the said company, pay for the stock so purchased by them and take up the notes given and money borrowed for that purpose, did conduct business under the name of The Coleman & Joyce Brewing Company, and open a bank account under that name, with the New York County National Bank, and deposit the money received by The Mutual Brewing Company from all sources in said bank to the credit of the Coleman & Joyce Brewing Company until on or about January 10, 1890, and during that period money was paid out by the defendants Matthew Coleman and Edward Joyce to meet the liabilities incurred in the purchase of stock of The Mutual Brewing Company, and the New York and College Point Ferry Company, and not for the benefit of the Mutual Brewing Company.

Eighteenth. That the plaintiff alleges, upon information and belief, that on or about the 20th day of August, 1889, the defendants Matthew Coleman and Edward Joyce borrowed from the New York County National Bank, upon notes made by Edward Joyce to the order of Matthew Coleman and indorsed by the Coleman & Joyce Brewing Company, ten thousand dollars, and upon similar notes so made and indorsed from the West Side Bank the sum of twelve thousand dollars, and that the money so obtained was applied in payment of liabilities incurred by said defendants in the purchase of the stock of the Mutual Brewing Company and the New York and College Point Ferry Company.

Nineteenth. That on the 18th day of November, 1889, an action was brought by the defendant Michael T. Coleman against the defendant The Fitzgerald Brewing Company, to recover the sum of seventeen thousand, nine hundred and seventy-one and $\frac{53}{100}$ dollars for malt alleged to have been sold by the firm of T. D. Coleman & Bros. to the defendant The Mutual Brewing Company, and that the summons and complaint therein was served upon the defendant Matthew Coleman, then the president of the Fitzgerald Brewing Company, and judgment was entered thereupon on the 10th day of December, 1889, for the sum of seventeen thousand, nine hundred and ninety-five and $\frac{77}{100}$ dollars, the defendant The Mutual Brewing Company not interposing any answer to the complaint and allowing judgment to be recovered by default. And that from the cause of ac-

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tion set forth in the complaint, it appears that the firm of T. D. Coleman & Bros. claim to have sold and delivered to the defendant The Mutual Brewing Company on the 10th day of November, 1889, malt of the value of seventeen thousand, nine hundred and seventy-one and $\frac{8}{100}$ dollars; that the plaintiff further alleges, upon information and belief, that at the time of said alleged sale the defendant Matthew Coleman was a member of the firm of T. D. Coleman & Bros., and that the firm of T. D. Coleman & Bros. did not deliver any such malt and that the same was a fictitious claim, and that the defendant Matthew Coleman allowed the judgment recovered against the Mutual Brewing Company to repay his brothers, Thomas D. Coleman and Patrick Coleman, the moneys alleged to have been advanced to enable the defendant Matthew Coleman to pay for the stock of The Mutual Brewing Company and the New York and College Point Ferry Company, and that said judgment was fraudulently and wrongfully allowed to be entered by said defendant Matthew Coleman to defraud the stockholders and the defendant The Mutual Brewing Company, and to enable the said defendant Matthew Coleman to appropriate the money to the credit of The Mutual Brewing Company for the stock so purchased by him as hereinbefore alleged.

Twentieth. That on the 18th day of November, 1889, another action was brought by the defendant Michael T. Coleman against the Fitzgerald Brewing Company to recover the sum of sixteen thousand, five hundred and ninety-four and $\frac{5}{100}$ dollars, and that the summons and complaint therein were served upon the defendant Matthew Coleman, then president of the Mutual Brewing Company, who allowed the plaintiff to take judgment by default, and judgment was entered therein on the 10th day of December, 1889, for the sum of sixteen thousand, six hundred and eighty-seven and $\frac{17}{100}$ dollars; that as appears from the complaint in this action the suit was brought to recover the sum of sixteen thousand, five hundred and ninety-four and $\frac{5}{100}$ dollars, being an alleged balance due from The Mutual Brewing Company to The Coleman Brewing Company, for money and merchandise claimed to have been sold and advanced to the defendant The Mutual Brewing Company between the 10th day of August and 19th day of November, 1889, amounting altogether to the sum of thirty-eight thousand, eight hundred and sixty-two dollars and $\frac{3}{100}$ dollars, upon which amount the defendant The Mutual Brewing Company has paid during that period, the sum of twenty-two thousand, two hundred and sixty-seven and $\frac{43}{100}$ dollars, leaving a balance of sixteen thousand, five hundred and ninety-four and $\frac{5}{100}$ dollars due, which claim was assigned to the defendant Michael T. Coleman by the defendant The Coleman Brewing Company, and the plaintiff further alleges upon information and belief that at the time of said assignment of said claim, and at the time of the entry of said judgment, The Mutual Brewing Company was not indebted to The Coleman Brewing Company or to its assignee, the defendant Michael T. Coleman, in any such sum whatsoever, and that the defendant The Coleman Brewing Company had not, during the period as herein alleged, advanced money or sold merchandise to The Mutual Brewing Company, as stated in said complaint.

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And that the defendant Matthew Coleman well knew that such a statement was false and untrue and that at said time he was president of The Coleman Brewing Company and of The Mutual Brewing Company, then the Fitzgerald Brewing Company, and that the defendant allowed said judgment to be fraudulently and wrongfully obtained for defrauding the stockholders and directors of The Mutual Brewing Company, and for the purpose of pledging the credit, property and money of The Mutual Brewing Company to his own use and to enable him to pay for the stock of The Mutual Brewing Company and the New York and College Point Ferry Company, so purchased by him.

Twenty-first. That the plaintiff alleges upon information and belief that said judgment so recovered, as hereinbefore stated, was so recovered without notice to any of the other directors and stockholders of said company except the defendants Matthew Coleman, Thomas D. Coleman, Patrick Coleman and Frederick Eder, and that the defendant Matthew Coleman, who was then president of the company, did not notify any of the other directors or stockholders in view of the fact that he had been served with a summons and complaint and that the judgments were given.

Twenty-second. That the plaintiff alleges upon information and belief, that in or about January, 1890, the banks which had loaned to the defendants Matthew Coleman and Edward Joyce the sum of money hereinbefore stated, desiring to be paid the sum so loaned or to be secured therefor, The Mutual Brewing Company gave to the New York County Bank, as trustee for the others, a chattel mortgage upon all its property, and upon the terms of said chattel mortgage, the company agreed to pay the amount so advanced by the bank to the defendants Matthew Coleman and Edward Joyce, and also agreed to pay the amount of judgments so recovered by Michael T. Coleman, and that the plaintiff further alleges upon information and belief that The Mutual Brewing Company was not liable for any of such amounts, and that the money so procured from the banks as hereinbefore stated was not applied and used in the purposes of the business of the said defendant The Mutual Brewing Company, but was used by the defendants Matthew Coleman and Edward Joyce for their own private use and benefit, and that the defendant The Mutual Brewing Company is not liable to pay the amounts secured by said mortgage, that said judgments were wrongfully and fraudulently recovered by the defendant Michael T. Coleman, and that the said chattel mortgage is invalid and void as against the defendant The Mutual Brewing Company, and that the company executed the same through its president and officers for the purpose of defrauding the stockholders and directors, allowing the defendant Matthew Coleman to appropriate the money and the credit of The Mutual Brewing Company for the stock so purchased by him.

Twenty-third. That the plaintiff alleges upon information and belief that prior to the execution of said chattel mortgage the defendant Matthew Coleman and Edward Joyce had entered into an agreement whereby the defendant Matthew Coleman, in consideration of the sum of thirty thousand dollars, purchased from the de-

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fendant Edward Joyce all his interest in the stock of The Mutual Brewing Company and in the stock of The New York and College Point Ferry Company, and the stock of The Coleman Brewing Company, and that said thirty thousand dollars was to be paid by delivering to the said Edward Joyce either beer brewed by the Mutual Brewing Company or the ale brewed by The Coleman Brewing Company, and that at the time of the assigning of such consent this sale had been arranged but not completed, and that at the signing of the consent by Edward Joyce and the execution of the mortgage he turned over to the said Matthew Coleman the stock of said companies, Matthew Coleman agreeing to indemnify the said Joyce against the notes that had been signed by him, and thereafter the consideration of said purchase was paid by delivering to said Joyce beer brewed by The Mutual Brewing Company and that before the commencement of this action, all the consideration of said agreement had been paid to the said Edward Joyce by delivering to him beer of the Mutual Brewing Company.

Twenty-fourth. The plaintiff alleges upon information and belief that on the 25th day of February, 1890, the defendants Thomas D. Coleman and Patrick Coleman recovered judgment against the Mutual Brewing Company, then the Fitzgerald Brewing Company, for the sum of eight thousand, two hundred and twenty-five and $\frac{44}{100}$ dollars; that such action was commenced on the 3d day of February, 1890, by the service of a summons and complaint upon the defendant Matthew Coleman, and that said judgment was allowed to be entered upon default, that the action was brought to recover said sum for malt alleged to have been sold and delivered by the said Thomas D. Coleman and Patrick Coleman to defendant The Mutual Brewing Company, between December 3d, 1889, and January 25th, 1890, and that plaintiff further alleges upon information and belief that the malt as alleged therein was not delivered by the said Thomas D. Coleman and Patrick Coleman, and that at that time the defendant Matthew Coleman was a member of the firm of T. D. Coleman & Bros., that said judgment was fraudulently and wrongfully obtained by the said Thomas D. Coleman, Patrick Coleman and Matthew Coleman, for the purpose of appropriating to their own use the property and assets of The Mutual Brewing Company and with intent to defraud the directors and stockholders of said Company.

Twenty-fifth. That the plaintiff alleges upon information and belief that thereafter and on or about April, 1890, the defendant Matthew Coleman sold to Edward Duffy, John N. Hayward, and Solomon Mehrbach stock of The Mutual Brewing Company, and that at that time the defendant Matthew Coleman represented and stated that the Mutual Brewing Company was doing a large and prosperous business and that the stock of said company was worth the sum of one hundred and forty dollars a share; that relying on said statements, the said Edward Duffy, John N. Hayward and Solomon Mehrbach purchased of the defendant Matthew Coleman five hundred shares of the capital stock of said company, and paid therefor the sum of seventy thousand dollars. That the stock so sold and delivered by the defendant Matthew Coleman was the stock pur-

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chased and produced by him as hereinbefore stated, and for which stock the defendant had not paid any of his money, but had obtained the same by using the money of The Mutual Brewing Company and pledging the credit of the said company.

Twenty-sixth. That the plaintiff alleges upon information and belief that the defendant Matthew Coleman sold the stock of the New York and College Point Ferry Company — procured by him as hereinbefore alleged — for the sum of seventy thousand dollars; that the stock of the New York and College Point Ferry Company so sold by the defendant Matthew Coleman was not purchased with his own money, but purchased by pledging the credit of The Mutual Brewing Company for that purpose.

Twenty-seventh. That the plaintiff alleges upon information and belief that prior to the sale by the defendant Matthew Coleman of the stock of The Mutual Brewing Company, the defendant Matthew Coleman had obtained the sum of thirty thousand dollars by having his notes indorsed by The Coleman & Joyce Brewing Company and The Mutual Brewing Company discounted, and that the money so obtained was used by the defendant Matthew Coleman to pay the amounts then due upon the stock in said Mutual Brewing Company, purchased by him as hereinbefore alleged, and that the money so obtained by him on the discount of such notes was wrongfully and fraudulently appropriated by him for that purpose and not applied to the use or benefit of the defendant The Mutual Brewing Company, and that said money was obtained from the said Solomon Mehrbach and afterwards paid by the Mutual Brewing Company.

Twenty-eighth. The plaintiff alleges upon information and belief that at the time of the sale of the stock by the defendant Matthew Coleman, the said Edward Duffy, John N. Hayward and Solomon Mehrbach, it was agreed by and between them that the sum of twenty thousand dollars was to be contributed by the said Matthew Coleman, ten thousand by the said Solomon Mehrbach, and five thousand dollars each by the said John N. Hayward and Edward Duffy, toward the working capital of the said The Mutual Brewing Company. The said defendant Matthew Coleman, instead of applying and using said money as working capital for the benefit of the business of The Mutual Brewing Company, paid out of said money the alleged judgment then on record in favor of his brothers and himself under the firm name of T. D. Coleman & Brothers, and paid a large amount thereof on the judgment recovered as therein stated to Thomas D. Coleman & Brothers, and a large portion thereof on account of the money obtained on the discount of said notes to the said Solomon Mehrbach.

Twenty-ninth. That the plaintiff alleges upon information and belief that on the 17th day of June, 1890, the real estate mortgage of forty thousand dollars was paid off and a new mortgage obtained for fifty thousand, out of which the first mortgage was paid off and the balance was expended in improving the property of the brewery and for purchasing a new plant, and that since the defendant Michael Coleman has obtained control of the said company, viz., August, 1889, up to the present time, no money has been expended

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in improving or supplying new machinery or material in carrying on the business of the said defendant The Mutual Brewing Company.

Thirtieth. That the plaintiff alleges upon information and belief that since the defendant Matthew Coleman has obtained the management and control of the said business, the business has been falling off and that the debts and liabilities of the said company have been increasing; that in January, 1889, the debts and liabilities of the said company were ninety thousand dollars; that in January, 1890, the debts and liabilities were ninety-five thousand dollars, and in January, 1891, the debts and liabilities of said company were the sum of one hundred and forty thousand dollars, and that there has not been any increase in the assets of the company.

Thirty-first. That the plaintiff alleges upon information and belief that the defendant Matthew Coleman has placed a false and fictitious value upon the assets of the said company for the purpose of deceiving the stockholders and directors of the defendant The Mutual Brewing Company, and has also had the books of the said company altered.

Thirty-second. That the plaintiff alleges upon information and belief that the number of directors of the defendant The Mutual Brewing Company is five and that the present directors are the defendants Matthew Coleman, Frederick Eder, Michael T. Coleman, this plaintiff, and one John N. Hayward, Jr., and that the defendants Matthew Coleman, Frederick Eder and Michael T. Coleman, have been acting in co-operation in said company; that the defendant Frederick Eder is also counsel for the company, and that the defendant Michael T. Coleman, who is a director of the said defendant, and who has judgments against the defendant The Mutual Brewing Company, and is also the Michael T. Coleman named in the chattel mortgage.

Thirty-third. That the plaintiff alleges upon information and belief that in or about December, 1891, the defendant Matthew Coleman stated that the New York County Bank and other banks demanded the payment of the moneys secured to be paid to them by the chattel mortgage as hereinbefore alleged, and that the notes secured to be paid by such chattel mortgage were the notes either made by the defendants Matthew Coleman and Edward Joyce or indorsed by them, and The Coleman & Joyce Brewing Company, and that the said defendant Matthew Coleman, for the purpose of having said notes paid out of the way, falsely stated that the said banks demanded payment thereof, and that thereafter a further chattel mortgage was executed, and that the defendant John N. Hayward advanced to the defendant Matthew Coleman the money to pay off the notes so held by the banks, and in the said new chattel mortgage so made by the defendant secures the payment of the money so advanced by the defendant John N. Hayward, and also the amount of the judgments recovered by the defendant Michael T. Coleman, but said amount is directed thereby to be paid to the defendants Thomas D. Coleman and Patrick Coleman, composing the firm of T. D. Coleman & Brother, and the plaintiff further alleges, upon information and belief, that the said chattel mortgage is invalid

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and void as against the defendant The Mutual Brewing Company, as through the fraudulent acts of the defendant Matthew Coleman to The Mutual Brewing Company, pledged its property and assets to pay the debts of the defendant Matthew Coleman, and that all the money secured to be paid by the said defendant Matthew Coleman was secured fraudulently and wrongfully in payment of his debts and not for the benefit of The Mutual Brewing Company.

Thirty-fourth. The plaintiff alleges upon information and belief that the defendant The Mutual Brewing Company is insolvent and unable to pay its debts and that such company has been so rendered insolvent by the wrongful and fraudulent acts of the defendants Matthew Coleman and Frederick Eder, its directors, and through the fraudulent acts of the defendants Thomas D. Coleman and Patrick Coleman, Edward Joyce and Dennis Coleman.

Thirty-fifth. The plaintiff alleges upon information and belief that on or about the 13th day of June, 1893, one George S. Mitchell obtained a judgment against the defendant The Mutual Brewing Company, through the fraudulent acts of the defendants Frederick Eder, Matthew Coleman and Michael T. Coleman, for the sum of eight hundred and thirty-eight and $\frac{88}{100}$ dollars on a promissory note of the defendant The Mutual Brewing Company to the order of Frederick Eder, payable on demand.

Thirty-sixth. That the plaintiff alleges upon information and belief that on the 13th day of June, 1893, one Dennis Coleman, one of the defendants and a brother of the defendants Matthew Coleman, Patrick Coleman and Thomas D. Coleman, recovered a judgment in Albany county, New York State, against the defendant The Mutual Brewing Company, through the wrongful and fraudulent acts of the defendants Matthew Coleman, Michael Coleman and Frederick Eder, for the sum of nineteen thousand, four hundred and fifty-six and $\frac{20}{100}$ dollars, on a note made by the defendant The Mutual Brewing Company, to the order of Dennis Coleman, payable on demand, and that the consideration of said note, as plaintiff is informed and believes, is an alleged sale made by the said Dennis Coleman, by the defendant The Mutual Brewing Company, through Matthew Coleman, as his agent, of certain ale casks and tubs, used in the manufacture of ale, and which were not delivered at the time of the making of said note and have not yet been delivered. And that said tubs and casks so alleged to have been sold were at the time, the property of the defendant The Coleman Brewing Company, of which the defendant Matthew Coleman is the president, and that the same are mortgaged to Thomas D. Coleman for money alleged to have been advanced and merchandise sold by the defendants Thomas D. Coleman, Patrick Coleman and the defendant The Coleman Brewing Company, and that said casks and tubs are old and are of the value of nineteen thousand dollars.

Thirty-seventh. That the plaintiff alleges, upon information and belief, that on the 13th day of June, 1893, the said Dennis Coleman recovered a judgment for the sum of eight thousand, one hundred and one and $\frac{1}{100}$ dollars upon notes made by the Mutual Brewing Company to the order of the defendant Matthew Coleman, and

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signed by him as president of said company, and also for money claimed to have been advanced by said Matthew Coleman to the said defendant The Mutual Brewing Company, and that said notes and alleged claim for money advanced to the defendant were assigned by the defendant Matthew Coleman to the said Dennis Coleman, and that the plaintiff further alleges upon information and belief that the notes so made by the defendant The Mutual Brewing Company to the defendant Matthew Coleman are claimed to have been made for the purpose of paying the defendant Matthew Coleman his salary.

Thirty-eighth. That the plaintiff alleges upon information and belief that on the 14th day of June, 1893, one Louis W. Duesing recovered a judgment against the defendant The Mutual Brewing Company for the sum of \$1,535.44, upon a promissory note alleged to have been made by the defendant The Mutual Brewing Company to the order of Frederck Eder, and that said judgment was obtained through fraudulent and wrongful acts of the defendants Matthew Coleman, Michael T. Coleman and Frederick Eder.

Thirty-ninth. That the plaintiff alleges upon information and belief that the judgments so recovered on the 13th and 14th days of June, 1893, were allowed to be recovered by the defendants, through the wrongful acts of the defendants Matthew Coleman, Michael T. Coleman and Frederick Eder, for the purpose of destroying the credit of the defendant The Mutual Brewing Company, and for the purpose of giving said defendants a preference over the other creditors of The Mutual Brewing Company.

Wherefore the plaintiff demands judgment that the defendants be obliged to account to The Mutual Brewing Company for the money and property of The Mutual Brewing Company, appropriated by them to their own use, and that the plaintiff have judgment against the defendants for the moneys due by them on such accounting, and that they be directed to pay the same to The Mutual Brewing Company.

Second. That a receiver be appointed.

Third. That the defendants Matthew Coleman, Michael T. Coleman and Frederick Eder be enjoined from acting as the president, officers or directors or agents of the defendant The Mutual Brewing Company during the pendency of this action, and from interfering with the property of said company.

Fourth. That an injunction issue restraining the defendants Matthew Coleman, Michael T. Coleman and Frederick Eder from interfering with the business of the Mutual Brewing Company, or from selling or disposing of the property of The Mutual Brewing Company and restraining the defendants Dennis Coleman, George S. Mitchell and Louis W. Duesing from interfering with the judgments so recovered by them, and the defendants Christian F. Tietjen, trustee of John N. Hayward, Thomas D. Coleman & Brothers from foreclosing the chattel mortgage held by him.

Fifth. That the chattel mortgage made by the defendant The Mutual Brewing Company, Christian F. Tietjen, trustee of John N. Hayward, and Thomas D. Coleman & Brothers to be vacated and set

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aside as invalid and void against said defendant, and that the judgment so recovered by the defendants Dennis Coleman, George S. Mitchell and Louis Duesing, be vacated and set aside.

Sixth. That the plaintiff have judgment as hereinbefore requested with costs, or for such other and further relief as to the court may seem meet.

DURNIN & HENDRICK,
Attorneys for Plaintiff.

ARTICLE III.

ACTION FOR DISSOLUTION OF A CORPORATION AND TO ENFORCE LIABILITY OF OFFICERS AND STOCKHOLDERS.

§§ 1784-1796.

SUB. 1. ACTION BY JUDGMENT CREDITOR FOR SEQUESTRATION. § 1784.

2. ACTION TO DISSOLVE CORPORATION. §§ 1785, 1786, 1796.

3. TEMPORARY INJUNCTION. § 1787.

4. RECEIVER. § 1788, 1789.

5. WHEN ACTION MAINTAINED AGAINST STOCKHOLDERS OR OFFICERS. §§ 1790, 1791, 1792.

6. JUDGMENT AND ITS PROVISIONS. §§ 1793, 1794, 1795.

SUB. 1. ACTION BY JUDGMENT CREDITOR FOR SEQUESTRATION.
§ 1784.

§ 1784. Action by judgment creditor for sequestration, etc.

Where final judgment for a sum of money has been rendered against a corporation created by or under the laws of the State, and an execution issued thereupon to the sheriff of the county, where the corporation transacts its general business, or where its principal office is located, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action to procure a judgment sequestering the property of the corporation, and providing for a distribution thereof, as prescribed in section 1793 of this act.

See rule 80, chapter XXI.

A proceeding under § 1784 of the Code of Civil Procedure is an equitable action, and a judgment creditor of a corporation seeking to sequester its property to satisfy his judgment may, if a fraudulent transfer of the corporate property is alleged, join as parties defendant the persons who hold such property in their possession. In analogy to the procedure under a creditor's bill in equity, the complaint, seeking to reach corporate assets, may unite claims for property in the possession or under the control of the judgment debtor with demands against other parties who have obtained possession of the property of the corporate judgment debtor by fraudulent transfers thereof. *Proctor v. Sidney Sash, Blind and Furniture Company*, 8 App. Div. 42.

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This remedy is limited to creditors who have proceeded to execution without satisfaction; *Mann v. Pentz*, 2 Sandf. Ch. 257; and, therefore, a creditor at large who has no judgment is not entitled to the benefits of the statute. *Dambman v. The Empire Mill*, 12 Barb. 341. Section 1784 has not changed the rule requiring that execution shall issue before an equitable action in the nature of a creditor's bill can be maintained against a corporation. *Easton National Bank v. Buffalo Chemical Works*, 48 Hun, 557. This authority does not supersede the attorney-general's power to institute proceedings to dissolve, nor the power of a general creditor without a judgment to institute proceedings to restrain the improper exercise of certain powers, or to procure the payment of his debt; each proceeding may go on with the rights peculiar to each, subject to the power of the court to restrain unnecessary suits. *Dambman v. The Empire Mill*, 12 Barb. 341. The right of a corporation to defend an action or appeal from a judgment is not affected by a judgment in another action sequestering its property. Until the corporation is dissolved, a contract may be enforced against it as well after as before the appointment of a receiver. The sequestration interrupts the ordinary business of a corporation, but does not necessarily affect the corporate franchises, and if the assets are more than sufficient to liquidate its liabilities, the surplus goes back to the corporation on paying its creditors. The corporation is entitled to have the action for sequestration discontinued and receiver discharged. *Parry v. American Opera Co.* 12 Civ. Pro. R. 195, citing *Mann v. Pentz*, 3 N. Y. 419; *Angell v. Silsbury*, 19 How. 48. Until judgment dissolving the corporation and ending its existence, a contract can be enforced against a corporation. *Kincaid v. Dwinelle*, 59 N. Y. 548; *Pringle v. Woolworth*, 90 N. Y. 510. The remedy by sequestration against a corporation, must be based on a final judgment, and the issue and return of an execution unsatisfied. Where, therefore, the judgment on which the sequestration proceedings are based is opened and the defendant is allowed to come in and defend, but the judgment is ordered to stand as security, there is no longer a final judgment and the sequestration proceedings must fall. *Rodbourn v. Utica, etc. R. R. Co.* 28 Hun, 369. In *Whittlesey v. Frantz*, 74 N. Y. 456, it was held that under § 36, 2 R. S. 463, for which this section is a substitute, the appointment of a receiver was a proceeding against the

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corporation, and if the appointment was binding as to it, no one else could question it. The jurisdiction of the court to entertain the proceeding did not depend on the truth of the facts alleged in the petition; the determination of the court on the facts, whether rightful or not, does not affect the jurisdiction. Where the complaint in an action alleged the appointment of plaintiff in sequestration proceedings under the Revised Statutes, and the appointment was claimed to be invalid on the ground that this section provides for the only means of appointment by action, *held*, that a former judgment between the parties was an adjudication on that subject, and it was not now before the court. *Griffin v. Long Island R. R. Co.* 102 N. Y. 449. In *Mannock v. Mannock*, 23 Alb. L. J. 216, it is held that the court has no power to interfere with a corporation on petition when no action is pending. A judgment creditor who files a bill against stockholders after the return of execution obtains no preference. *Morgan v. N. Y. & A. R. R. Co.* 10 Paige, 290; *Tallmage v. Fishkill Iron Co.* 4 Barb. 382. In an action brought to sequester the property of a corporation, a receiver was appointed on default. No notice was given to the attorney-general, as required by chapter 378, Laws 1883. Upon notice to the attorney-general, an order was entered appointing such receiver *nunc pro tunc*. *Held*, that without deciding whether a jurisdictional defect could be cured by an amendatory order, that the order made in this case had the effect from its date of making the appointment valid. *Morrison v. Menhaden Co.* 37 Hun, 522. A receivership to sequester the property of a railroad company comes within the spirit and intent of the law of 1883, requiring notice to be given to the attorney-general, of all proceedings in an action for the dissolution of a corporation or a distribution of its assets. *Whitney v. N. Y. & Atlantic R. R. Co.* 66 How. 436.

The right to invoke the remedy under this section belongs only to a judgment creditor. It plainly excludes the case where the company, though insolvent, is possessed of sufficient property, real or personal, within the county where it transacts its general business or where its principal office is located to satisfy the judgment creditor's execution. It is a proceeding looking solely to the sequestration of such assets of the company as are not leviable. It is only when creditors have had all the tangible property of the company within one or the other of the specified

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counties applied upon their execution and there is still a balance unpaid thereon that the court is authorized to appoint a receiver, and it is only the assets which are left after the application in this way of the tangible property, that are to be distributed in the sequestration proceedings equally among all the creditors. *National Broadway Bank v. Wessel Metal Company*, 59 Hun, 470; s. c. 37 St. Rep. 102.

The existence of a judgment of sequestration against a domestic corporation, which enjoins creditors from bringing actions against it during the year given a creditor by the Manufacturing Corporations' Act of 1848, in which to bring an action against the corporation, is a condition precedent to maintaining an action to enforce a personal liability of a stockholder for debts of the corporation under § 18 of that act, excludes a creditor from compliance with that condition precedent. In such case, such judgment is not open to collateral attack, and rejection on the ground that the precedent judgment against the corporation relied on in the action of sequestration as evidence of the right to maintain that action, was a void judgment. *Hunting v. Blum*, 69 Hun, 562; s. c. 53 St. Rep. 343.

In an action against a corporation brought by a judgment creditor to sequester the property of the corporation to enforce the liability of all the stockholders for its debts, resulting from their failure to fully pay for the stock, it is not necessary that the complaint set forth the claim on which the judgment against the corporation was recovered. In such an action both the corporation and its stockholders are proper party defendants. This section construed with § 1793, requires that when a judgment has been obtained a final decree must provide for a just and fair distribution of the property of the corporation among its honest creditors, when all will share in the distribution of the property of the corporation, while the creditor bringing the action in fact brings it for all the creditors of the corporation, although a statement to that effect is not required by the Code. The court may bring in all the parties interested. The plaintiff can in no event recover any more than his proportionate share of the assets of the corporation. *Woodard v. Holland Medicine Co.* 21 Civ. Pro. R. 23; s. c. 39 St. Rep. 411; s. c. 15 Supp. 128.

The provisions of § 1986, relative to compensation to the attorney-general, and security to be given by the relator, refer to ac-

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tions brought under this section. *People v. Buffalo Stone & Cement Co.* 131 N. Y. 140; s. c. 42 St. Rep. 753. The Superior Court of the city of New York has, within its territorial limits, jurisdiction in equity co-equal with that of the Supreme Court, to act under the provisions of this section. *Jelly v. Paraiso Co.* 15 Civ. Pro. R. 86. Where a receiver has been appointed of the property of a corporation by the Supreme Court, and the plaintiff, a judgment creditor, sought the appointment of a receiver in proceedings for sequestration under § 1784, it was held that the power might be properly exercised, provided the authority vested in the receiver did not conflict with the authority of the receiver appointed by the Supreme Court. *Thau v. The Bankers & Merchants' Telegraph Co.* 16 St. Rep. 581; s. c. 2 Supp. 11. A court of this State has no authority to appoint a receiver of a foreign corporation, in an action brought here to sequester the property of such corporation. *Burgoyne v. Eastern & Western R. R. Co.* 19 Civ. Pro. R. 384; s. c. 13 Supp. 537.

The entry of a judgment of sequestration against a corporation and the appointment of a permanent receiver, do not deprive the corporation of power thereafter to take and prosecute appeals from judgments entered against it. *Auburn Button Co. v. Sylvester*, 68 Hun, 401; s. c. 52 St. Rep. 180. A judgment in a sequestration action, brought by a creditor against a corporation, under § 1784, appointing a receiver, does not dissolve the corporation or prevent prosecution of actions against it. *People v. Troy Steel & Iron Co.* 63 St. Rep. 787, 82 Hun, 304, 24 Civ. Pro. R. 201, citing *Del Valle v. Navarro*, 21 Abb. N. C. 136; *Auburn Button Co. v. Sylvester*, 68 Hun, 401, 52 St. Rep. 180.

Precedent for Complaint to Sequester Property of a Corporation.

SUPREME COURT—ULSTER COUNTY.

THE KINGSTON NATIONAL BANK

agst.

THE JAMES CEMENT COMPANY.

The complaint of the above-named plaintiff respectfully shows to this court, that the said plaintiff is both a domestic and foreign corporation, created under the Laws of the State of New York, and the

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Laws of the United States of America; that the defendant is a domestic corporation created under the Laws of the State of New York.

The complaint further shows that on or about the 15th day of January, 1887, the above plaintiff recovered against the above defendant a final judgment in this court for the sum of \$794.58, which said judgment was rendered against the said defendant, which is a corporation created under the Laws of the State of New York, for a sum of money, and the action in which the judgment was rendered was founded upon the promissory notes of the said defendant overdue, and which were held and owned by the said plaintiff; that said judgment was duly entered in the Ulster county clerk's office, and the judgment-roll therein duly filed in said clerk's office; that the execution, in due and regular form, has, since the entry of said judgment, been duly issued to the sheriff of the said county of Ulster, and has since been duly returned wholly unsatisfied; that the said defendant transacts its general business in said county of Ulster, and its principal office is located in the town of Esopus in said county of Ulster; that plaintiff, therefore, demands the judgment of this court sequestrating the property of the said defendant, and for a just and fair distribution thereof and of the proceeds thereof among its fair and honest creditors, in the order and in the proportion prescribed by law, in case of the voluntary dissolution of a corporation; and that a temporary receiver may be appointed, pending this action, of the property and effects of the defendant, and that the final judgment to be entered herein may direct the appointment of a permanent receiver herein of said property and effects, or for such further or other judgment or relief or decree as may be just and agreeable to equity.

R. BERNARD,
Plaintiff's Attorney.

The complaint may be accompanied by a notice of motion for appointment of a receiver and the final judgment will provide for the appointment of a permanent receiver. As to the rights, powers and duties of such receivers, see that subject in a subsequent chapter.

Precedents for order appointing temporary receiver and for receiver's bond will be found, Receivers, Art. III.

Judgment Appointing Permanent Receiver, and of Sequestration.

At a Special Term of the Supreme Court of the State, etc.

THE KINGSTON NATIONAL BANK

agst.

THE JAMES CEMENT COMPANY.

The summons and complaint herein, having been duly served on the defendant January 15, 1887, and being also duly served on the

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attorney-general of the State of New York on January 17, 1887, a copy of which said summons and complaint is hereto annexed, and more than twenty days having elapsed since such service, and no answer or demurrer or appearance having been interposed by said defendant or said attorney-general; and whereas, on January 25, 1887, after due notice to the said defendant and to said attorney-general, by an order of this court, granted at a Special Term thereof. Amasa Humphrey was duly appointed the temporary receiver of said defendant, and duly gave the bond required by said order, and has entered upon the discharge of his duties: Now, on motion of R. Bernard, the attorney of said plaintiff, it is hereby ordered, adjudged and decreed, the attorney-general of the State of New York having had due notice of the application for judgment, and a copy of this proposed judgment having been served upon him and he making no objection hereto, that the goods, property and effects of the said defendant be sequestered, and for a just and fair distribution thereof and of the proceeds thereof among the fair and honest creditors of the defendant, in the order and in the proportion prescribed by law in case of the voluntary dissolution of a corporation; that said Amasa Humphrey, of said city of Kingston, be and he hereby is appointed the permanent receiver of the defendant and its stock, property, franchises, bonds, contracts, things in action, and effects of every kind and nature, with the usual powers and duties, according to the laws of this State, and the practice of this court, upon his executing and acknowledging in the usual form, and filing with the clerk, for the county of Ulster, a bond to the people of the State of New York in the penal sum of \$20,000, with at least two sureties, freeholders or householders of the State of New York, who shall severally justify, conditioned for the faithful discharge of the duties of receiver, and for the due accounting for all moneys or property of every kind received by him as such receiver, which bond is to be approved as to its sufficiency and manner of execution by a justice of this court; that upon said filing, so approved, said receiver proceed forthwith to collect and receive the debts, demands and other property of said defendant, and to preserve the property and the proceeds of the debts and demands collected, to sell, dispose of, and convert into money all other property, real and personal, of said defendant, to collect, receive and preserve the proceeds thereof, and to maintain any action or special proceeding for either of those purposes; that the defendant, its directors, officers, agents and servants, and all persons whomsoever, having notice of this judgment, be and they are hereby enjoined from in any manner interfering with said receiver in the discharge of his duties as such, and from collecting any of the debts or demands, and from paying out, disposing of, or in any way interfering with, transferring or delivering to any person any of the money, property, or effects of the said defendant, except to deliver the same to the said receiver; that, on the demand of said receiver, the said defendant deed, convey, transfer, set over, assign or sell to said receiver, any and all its property, real and personal; that the said receiver shall deposit all funds of the

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defendant coming in his hands not needed for immediate disbursement in the Ulster County National Bank of Kingston, New York.

C. R. INGALLS,
Justice Supreme Court.

SUB. 2. ACTION TO DISSOLVE CORPORATION. §§ 1785, 1786, 1796.

§ 1796. Effect of this article limited.

This article does not repeal or affect any special provision of law, prescribing that a particular kind of corporation shall cease to exist, or shall be dissolved, in a case or in a manner, not prescribed in this article; or any special provision of law, prescribing the mode of enforcing the liability of the stockholders of a particular kind of corporation.

§ 1785. Action to dissolve a corporation.

In either of the following cases, an action to procure a judgment, dissolving a corporation, created by or under the laws of the State, and forfeiting its corporate rights, privileges and franchises, may be maintained, as prescribed in the next section:

1. Where the corporation has remained insolvent for at least one year.
2. Where it has neglected or refused, for at least one year, to pay and discharge its notes or other evidences of debt.
3. Where it has suspended its ordinary and lawful business for at least one year.
4. If it has banking powers, or power to make loans on pledges or deposits, or to make insurances, where it becomes insolvent or unable to pay its debts, or has violated any provisions of the act, by or under which it was incorporated, or of any other act binding upon it.

§ 1786. [Am'd, 1880.] Id. ; by whom to be brought.

An action specified in the last section, may be maintained by the attorney-general, in the name and in behalf of the people. And whenever a creditor or stockholder of any corporation submits to the attorney-general a written statement of facts, verified by oath, showing grounds for an action under the provisions of the last section, and the attorney-general omits, for sixty days after this submission, to commence an action specified in the last section, then, and not otherwise, such creditor or stockholder may apply to the proper court for leave to commence such an action, and on obtaining leave may maintain the same accordingly.

Proceedings instituted by the directors of a company do not constitute a bar to the prosecution of an action by the attorney-general, in the name of the people to dissolve the corporation. *People of the State of New York v. Seneca Lake Grape and Wine Co.* 52 Hun, 174; S. C. 23 St. Rep. 346.

On an application to dissolve a bank and have a temporary receiver appointed, it was held where there was doubt whether the stockholders had a remedy, that the application of the attorney-general for a dissolution should be granted. *Tefft v. North River*

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Bank, 14 Supp. 8; s. c. under name *People v. North River Bank*, 26 Abb. N. C. 189.

In *People v. Equitable Gas Works, etc. Co.* 3 Misc. 333, it was held that where the charter of the company contained a provision that upon a certain contingency "its corporate power shall cease," such power ceased upon the happening of such contingency. s. c. 52 St. Rep. 317, 23 N. Y. Supp. 124. However, in *Day v. Ogdensburg & Lake Champlain R. R. Co.* 107 N. Y. 129, and in *Matter of the Application of the Brooklyn Elevated R. R. Co.* 125 N. Y. 434; s. c. 35 St. Rep. 451, affirming 11 Supp. 161, it is said that a railroad corporation by omitting to perform a duty imposed upon it by its charter, does not, in the absence of words in the charter making such compliance a limitation upon the original grant of power, lose its corporate character. To dissolve the corporation there must be a judicial proceeding and judgment declaring the forfeiture, and where the charter contained a provision that in case of default it should "forfeit all rights acquired by" it under the act of incorporation, the provision did not put an end to the corporate life in case of default, but simply exposed it to proceedings on behalf of the State to establish and enforce the forfeiture, and until the State thus intervened, a private individual might not set up the forfeiture, or in any way challenge the corporate existence. (72 N. Y. 245, 79 N. Y. 335, 78 N. Y. 524, distinguished.)

The question whether a forfeiture clause in an act of incorporation is or is not self-executing depends wholly upon the language employed by the legislature, which has undoubted power to provide in an act of incorporation that corporate existence shall cease by the mere failure of the corporation to perform certain acts imposed by its charter. It requires strong and unmistakable language to authorize the courts to hold that the legislature intended that a forfeiture of corporate existence should be affected without judicial proceedings on the intervention of the attorney-general. The words "all rights and privileges granted hereby shall be null and void" do not render a forfeiture clause in a charter self-executing, but the meaning of "null and void" in such a connection is that the corporate existence shall be "voidable," that is that in case of default the corporation may be dissolved through appropriate legal proceeding by the attorney-general. *Matter of New York and Long Island Bridge Co. v. Smith*, 148 N. Y. 540.

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Where it appears that a corporation has never exercised its powers or franchises, and that such non-usage is wilful and without justification, also that its officers have conspired to do other illegal acts under cover of the corporation, an action is maintainable by the attorney-general under leave of the court to dissolve the corporation, although it is a private corporation. *People of the State of New York v. The Milk Exchange*, 133 N. Y. 565; S. C. 44 St. Rep. 500. An action for the dissolution of a corporation which has been insolvent may be maintained by a majority of the trustees of the corporation being stockholders. *Medbury v. Rochester Frear Stone Co.* 19 Hun, 498, explained in *Killredge v. Kellogg Bridge Co.* 8 Abb. N. C. 168. An action to dissolve a corporation for failure to pay its notes, or for suspending its ordinary and lawful business for one year, must be brought by the attorney-general, and not by a stockholder. *Wilmersdoerffer v. Lake Mahopac Co.* 18 Hun, 387. See present language of § 1786, as to when stockholder can bring action. A stockholder of other than a moneyed corporation is not entitled to a decree winding up the affairs of the corporation and appointing a receiver. *Blivin v. Peru Steel and Iron Co.* 9 Abb. N. C. 205. Refusal by a bank to pay a draft protested for non-payment for ten days, and a continuance of banking business for that time, is ground for dissolution, though the omission to pay was under the belief the matter would be arranged otherwise, if the bank have probable cause to believe the money was not due from it. *Bank Commissioner v. Bank of Buffalo*, 6 Paige, 503. The mere fact that the demand notes of a corporation remain outstanding is not an act of insolvency in the absence of any demand of payment. *Denike v. N. Y. & R. Lime and Cement Co.* 80 N. Y. 599. In the absence of fraud or mismanagement, a portion of the stockholders of a company have no absolute right to the appointment of a receiver, though it be insolvent; that is a matter of discretion. *Denike v. N. Y. & R. Lime and Cement Co.* 80 N. Y. 599. When a corporation becomes insolvent, the directors may lawfully resign in order to obtain the appointment of a receiver, and it is proper for them to do so. *Smith v. Danzig*, 64 How. 320. In an action to dissolve a corporation on the ground that it has remained insolvent for at least one year, and that it has for that time suspended its ordinary and lawful business it is immaterial whether the corporation is a manufacturing corporation or not, inasmuch as the provisions of

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the Code containing this section refer to all corporations created by or under the laws of the State. Where the complaint alleged that the corporation had been unable to meet its obligations, and had failed to pay a judgment therein set forth, that it had not a dollar in the treasury, and was insolvent, and had been for at least a year past, *held*, that an answer alleging payment of the judgment and averring the corporation had no liabilities to creditors by way of judgments unsatisfied, was insufficient. That a corporation may be insolvent against which no judgments have been recorded. A corporation, like an individual, is insolvent when it cannot pay its debts. *People v. Excelsior Gas-light Co.* 8 Civ. Pro. R. 390. Insolvency means a general inability to pay debts, to fulfill obligations according to its undertaking, a general inability to answer, in the course of business, the liabilities existing and capable of being enforced, not an absolute disability to pay at some future time, but not in a condition to pay debts in the ordinary course, as persons carrying on trade usually do it, free from unusual or unforeseen contingencies. *Ferry v. Bank of Central New York*, 15 How. 445. Where a corporation alleges that judgment was obtained against it by collusion and fraud of its president, if no application be made to open the same within a reasonable time, a receiver will be appointed. *Loder v. N. Y. etc. R. R.* 4 Hun, 227. An insolvent life insurance company may be dissolved and its affairs wound up at the instance of a single stockholder. *Masters v. Electric Life Ins. Co.* 6 Daly, 455. Where it appeared the assets of a life insurance company were short a sum equal to the amount of its outstanding policies, that its capital had been sunk, some of its assets were not easily available, and its management careless, it was held a proper case for the appointment of a receiver on the application of the attorney-general. *People v. Atlantic Mutual Life Ins. Co.* 74 N. Y. 177; *People v. Globe Mutual Life Ins. Co.* 60 How. 57, 60 How. 82.

It was held, before the Code of Procedure, that a creditor at large of a corporation could not maintain an action to have it dissolved on the ground of insolvency, and to compel its trustees, directors and officers to make good the losses which it had sustained by reason of their mismanagement. "Creditor" means judgment creditor. *Belknap v. North Am. Life Ins. Co.* 11 Hun, 282; *Cole v. Knickerbocker Life Ins. Co.* 23 Hun, 255; appeal dismissed by consent, 91 N. Y. 641. A plaintiff, as a mere

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owner of corporate shares, has not the legal right to apply for a dissolution of a corporation and the winding up of its affairs; nor can a mere contract creditor maintain the action. *Byrne v. N. Y. Brick and Cement Co.* 16 Week. Dig. 130. To entitle a creditor to the aid of equity in reaching assets, there must be a judgment and execution issued thereon and returned unsatisfied. The fact that the debtor is an insolvent corporation, and has conveyed its property in contravention of the statute, does not authorize a resort to equity till the remedy at law has been exhausted; nor can an equitable action be sustained on the ground that the appointment of a receiver is necessary to preserve the property during litigation. *Adee v. Bigler*, 81 N. Y. 349. Under the Revised Statutes, an insolvent insurance corporation could not be dissolved at a stockholder's suit, but only in an action brought by the attorney-general. *Attorney-General v. Continental Life Ins. Co.* 53 How. 16.

Where a mutual fire insurance company was permitted by its charter to do business on its capital of premium notes, where it was claimed that it had failed to comply with the provisions of that and subsequent charters, it was held on application of the attorney-general that the business of the company must be closed on the ground of its insolvency and violation of law, unless its capital was made good according to the requirements of the act under which it was incorporated. *People v. Manhattan Mutual Fire Insurance Co.* 12 Supp. 264; S. C. 34 St. Rep. 570.

It was held, *People v. Atlantic Ave. R. R. Co.* 57 Hun, 378; S. C. 32 St. Rep. 717, that an action by the attorney-general to dissolve a railroad corporation because of a failure to exercise its corporate powers, could not be sustained under an averment and proof that the railroad company had discontinued its business for six days; affirmed 125 N. Y. 513, holding that where an act or omission is not made by statute a cause of forfeiture, irrespective of its intent or character, such act cannot be made the basis of an action to forfeit the charter of a corporation, unless it is intentional or voluntary, or is such neglect as indicates indifference to the demands of public duty, or so material a disobedience of law as within established rules will warrant a judgment of dissolution. Section 1785 fixes the period of non-user which will give a right of forfeiture of corporate rights and franchises, at one year, makes a mere non-user for a less period no ground for dissolution. S. C. 35 St. Rep. 872.

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In an action to dissolve a corporation for failure to carry on its business for over a year, a corporation from which the one in question claims to have acquired its rights, and which is alleged to have ceased to exist before the transfer of such rights, is a proper party. The complaint in such an action alleging that the defendant had never assumed the performance of what is claimed to be its lawful business; that it has not commenced the construction of its tunnel or railway, and that no proceedings to condemn the right of way have been taken, is sufficient. *People v. New York City Central Underground R. R. Co.* 50 St. Rep. 454.

Where the directors of an insolvent corporation refused to bring proceedings for its dissolution, so that the rights of the creditors and stockholders may be protected and there is danger that all the assets may be wiped out by executions, a stockholder may maintain an action in equity to compel such distribution of the assets. *Porter v. Industrial Improvement Co.* 5 Misc. 262, citing *Brinckerhoff v. Bostwick*, 88 N. Y. 52. A judgment for the dissolution of a corporation and the appointment of a receiver, brought under § 1785, ordinarily has the effect of preventing the maintenance of an action against a corporation, and if actions are pending at the time of the rendition of such judgment they cannot be continued unless by order of the court by whom the judgment was rendered. *People v. Troy Steel & Iron Co.* 24 Civ. Pro. R. 201. The cause of action given by § 1902 does not abate against a corporation upon its dissolution, but may be continued by order of the court against a receiver. *People v. Troy Steel and Iron Co.* 63 St. Rep. 787. The court has no general jurisdiction of an action brought for the dissolution of a corporation. This power in that respect is derived solely from the statute, and unless the complaint in an action brought for that purpose shows jurisdictional facts, the court has no power to act, its decree is void and the corporation still exists; and judgment in such an action may be treated as void so far as it relates to the sequestration of the property of the corporation, but so far as it purports to dissolve the corporation it is a nullity. *Osborn v. Montclac Park Co.* 89 Hun, 167.

The provisions of § 1785 are limited in the case of mutual insurance companies by § 43, chapter 690, of Laws of 1892, and a temporary receiver will not be appointed in an action to dissolve

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such a corporation where the effect of the appointment would be to impair, if not destroy, a valuable business. *The People v. Equitable Fire Ins. Co.* 12 Misc. 556, 67 St. Rep. 577.

Suspension of ordinary business means a substantial relinquishment of such business; as in case of an insurance company, a refusal to take new policies. A substantial suspension of business is a violation of law. *Matter of Jackson M. Ins. Co.* 4 Sandf. Ch. 559. Neglect to comply with the provisions of the charter, by a corporation, is an offence. *People v. Rensselaer Ins. Co.* 38 Barb. 323. A lease, by stockholders of a manufacturing company, of all its property, for two years, although the business is carried on, but by the lessee, is a suspension of ordinary business. *Conro v. Gray*, 4 How. 166. An election of trustees of the corporation is not sufficient if it suspends its operations. *Briggs v. Penniman*, 8 Cow. 387. Where insolvency and suspension of business are admitted, the law allows no excuse for forfeiture. *People v. North. R. R. Co.* 42 N. Y. 217. An allegation of practical suspension to a great extent, for the whole or greater part of a year, is not sufficient. *Bliven v. Steel and Iron Co.* 9 Abb. N. C. 205. It is not a sufficient defence to an action, brought under § 1786, for the dissolution of a corporation, to deny that the defendant is organized for manufacturing, mining, mechanical or chemical purposes. The sections refer to all corporations by or under the laws of the State. *People v. Excelsior Gas-light Co.* 3 How. (N. S.) 390.

Suspension of ordinary business for a year is not a dissolution till so judicially declared. *Mickles v. Rochester City Bank*, 11 Paige, 118, affirmed, 11 Paige, 129, n. Ceasing business does not terminate the existence of a manufacturing corporation. *Cary v. Schoharie Machine Co.* 2 Hun, 110. A manufacturing company is not dissolved by the appointment of a receiver under the Revised Statutes so as to bar an action against a stockholder on his individual liability. *Kincaid v. Drwinnelle*, 59 N. Y. 548. Dissolution does not take effect until judicially declared. *Ormsby v. Vermont Copper Co.* 65 Barb. 360, reversed on another point, 56 N. Y. 623; *Allen v. N. Y. Southern R. R. Co.* 49 How. 14; *Clancy v. Onondaga F. Salt Co.* 62 Barb. 395. It is not dissolved by the appointment of a receiver, and the sequestration of its property. *Huguenot Bank v. Studwell*, 6 Daly, 13, reversed on another point, 74 N. Y. 620. As the appointment of a receiver under the

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National Bank Act does not dissolve the corporation, a creditor whose claim has been rejected may bring an action to establish it. *Green v. Wallkill Nat. Bank*, 7 Hun, 63. As to what constitutes a dissolution of a corporation, and how forfeiture of corporate power is effected, see *Lea v. Am. Atl. & P. Can. Co.* 3 Abb. (N. S.) 1; *Nimmons v. Tappan*, 2 Sweeny, 652; *Tower v. Hale*, 46 Barb. 361. Real estate conveyed absolutely to a corporation does not revert to the grantor on the dissolution of the corporation. *Heath v. Barmore*, 50 N. Y. 502. The dissolution of a corporation terminates all pending actions, and all subsequent proceedings are void. *McColloch v. Norwood*, 58 N. Y. 562; *Sturges v. Vanderbilt*, 73 N. Y. 384. After dissolution a company can make no contract on which any claim payable out of its assets can be based. *Tinkham v. Borst*, 31 Barb. 407. After dissolution, process to begin a suit cannot be served on an officer of the company. *Hetzel v. Tannehill Silver M. Co.* 4 Abb. N. C. 40. On dissolution the interests of stockholders become equitable rights to proportionate shares of debts, and in the adjustment each stockholder is to be charged with what he owes. *James v. Woodruff*, 2 Den. 574. It is questionable whether in this State an action to dissolve a foreign corporation can be maintained. *Taylor v. Charter Oak Life Ins. Co.* 8 Abb. N. C. 331. But, notwithstanding forfeiture and dissolution of a foreign corporation by the tribunals where it existed, it is deemed to continue so far as to enable creditors to proceed within this State against its property here. *Hibernia Nat. Bank v. Lacombe*, 21 Hun, 166, affirmed, 84 N. Y. 367. The dissolution of a corporation does not terminate a lease entered into by it, nor does a covenant therein cease to be obligatory. *People v. National Trust Co.* 82 N. Y. 283.

Where a corporation, with the approval of all its stockholders, sold all its property for the purpose of discontinuing the corporate business, and by resolution declared itself dissolved, *held*, it should thereby be adjudged to have surrendered its franchise. *Webster v. Turner*, 12 Hun, 264. See, however, *Lake Ontario Nat. Bank v. Onondaga County Bank*, 7 Hun, 549; *Taylor v. Earle*, 8 Hun, 1. A lease for a term of years by a corporation is not terminated by its dissolution; *People v. National Trust Co.* 82 N. Y. 283; but a lessee must be made a party. *People v. Albany & Vt. R. R. Co.* 77 N. Y. 232. A forfeiture of franchises of a corporation cannot be decreed in a collateral proceeding. *Central Cross Town R. R.*

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Co. v. Thirty-third St. R. R. Co. 54 How. 168; *Matter N. Y. Elevated R. R. Co.* 70 N. Y. 327. A corporation is not dissolved, and in consequence incapacitated to sue and be sued by reason of its insolvency, assignment to trustees and suspension of corporate powers for a year. *New England Iron Co. v. Gilbert Elevated R. R. Co.* 91 N. Y. 153. The provisions of § 1793, that in an action for the sequestration of the property of the corporation, its property, after the payment of creditors, should be distributed among the stockholders, seems to indicate that a final decree of sequestration works a practical dissolution of the corporation. *Eddy v. Co-operative Dress Ass'n*, 3 Civ. Pro. R. 434.

The provisions of § 1786, relative to security for costs, expenses and compensation of the attorney-general, apply to an action under this section. *People v. Buffalo Stone & Cement Co.* 131 N. Y. 140; S. C. 40 St. Rep. 752.

Precedent for order appointing temporary receiver and for injunction order will be found under the appropriate titles.

Precedent for Complaint to Dissolve Corporation.

SUPREME COURT—HERKIMER COUNTY.

THE PEOPLE OF THE STATE OF
NEW YORK

agst.

E. REMINGTON & SONS.

The plaintiff in this action, by Denis O'Brien, attorney-general, as and for their complaint herein, upon information and belief, allege:

That in or about the year 1861, the said defendant was organized and incorporated as a manufacturing corporation, under the act of the Legislature of the State of New York, passed February 17, 1848, entitled "An act to authorize the formation of corporations for manufacturing, mining and mechanical purposes," and the acts amendatory thereto, under the corporate name E. Remington & Sons, and that ever since its incorporation it has been and is now located and doing business at Ilion, Herkimer county, New York, under said corporate name; that since its incorporation as aforesaid, the said defendant has been extensively engaged in the manufacture and sale of firearms and other articles; that for some years last past the said defendant has been embarrassed financially in its said business; that more than a year ago it became and was unable to pay and discharge its debts and liabilities in full as they became due,

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and became and was insolvent; that for at least one year last past the defendant has been, and has remained, and is now, unable to pay and discharge its debts and liabilities as they become due, or in full, and during said year has been, and has remained, and is now insolvent; that for at least one year last past the said defendant has been unable to pay and discharge its notes and other evidences of debt, and during said year has neglected to pay and discharge its notes and other evidences of debt, and is now unable to pay and discharge the same; that the said defendant is the owner and has in his possession a large quantity of real and personal property; that it is largely indebted to divers persons, firms and corporations, some of which indebtedness is past due; that it cannot dispose of its said property to pay such indebtedness, and it is not and will not be able to pay the same. That several suits for debts due have been commenced against the said defendant, and the time for obtaining judgments therein will expire in a few days; that if such judgments are allowed to be obtained and executions issued thereon, the property of the defendant will be levied on and sold at a great sacrifice, as plaintiffs verily believe, and such judgment creditors will obtain a preference over the other creditors of the defendant, and such other creditors will be greatly injured by the sacrifice of the defendant's property upon forced sales upon such executions; that the said defendant, in its present condition of financial embarrassment and insolvency, is not able to and cannot continue its corporate business, and that it is for the best interests of the creditors and stockholders that the corporation be dissolved and a receiver be appointed and its property distributed among its creditors according to law.

Wherefore the plaintiff demands judgment:

First. That the defendant corporation be dissolved and its rights, privileges and franchises forfeited.

Second. That a receiver of the property and effects of the corporation be appointed pursuant to the provisions of the statute, with all the power and authority conferred by law, and subject to all the duties and liabilities imposed upon receivers in such cases.

Third. That the defendant, its trustees, directors, managers and other officers be restrained by injunction, during the pendency of this action, from collecting or receiving any debt or demand, and from paying out or in any way transferring or delivering to any person any money, property or effects of the said corporation, except by express permission of the court; and from exercising any of its corporate rights, franchises and privileges of the corporation, except by express permission of the court.

Fourth. That the plaintiffs may have such other and further judgment or relief in the premises as may seem to the court proper to grant.

Fifth. That the plaintiffs recover the costs of this action.

D. O'BRIEN,
Attorney-General,
Plaintiff's Attorney.

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Precedent for Complaint to Dissolve a Corporation.

SUPREME COURT — COUNTY OF QUEENS.

THE PEOPLE OF THE STATE OF NEW YORK <i>vs.</i> THE MUTUAL BREWING COMPANY.	}
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COMPLAINT.

The People of the State of New York, the plaintiffs in this action, by Theodore E. Hancock, Attorney-General, for complaint herein, allege upon information and belief the following facts constituting their cause of action:

First. At the several times herein referred to, the defendant The Mutual Brewing Company was and still is a domestic manufacturing corporation duly organized under the Laws of the State of New York, under and by the corporate name above mentioned, and has its principal place of business at College Point, in the county of Queens, in said State.

Second. That the defendant has become insolvent and is unable to pay its debts in full, and has violated the various provisions of the statutes and the acts amendatory thereof by or under which it was incorporated, and of the acts of the Legislature binding upon it. That the debts and liabilities of the said defendant exceed the total amount of assets and the value of all its property by over \$50,000.00; and that said defendant has been and remained insolvent for more than two years last past.

Third. That the defendant The Mutual Brewing Company, has neglected and refused for more than one year last past, and still neglects and refuses, to pay and discharge divers and various of its notes and other evidences of debt.

Wherefore, the plaintiffs demand judgment dissolving the defendant corporation and forfeiting its corporate rights, privileges and franchises, and perpetually enjoining and restraining the defendant, its trustees, officers, agents and receivers from exercising any corporate powers, privileges and franchises, and from transferring, disposing of, and in any manner interfering with its property and assets, and the plaintiffs pray that during the pendency of this action an order may be granted restraining the defendant, its officers and agents, from transacting any corporate business or in any manner transferring, disposing of or interfering with any of its property or assets, and that a temporary receiver of such property and assets be appointed with all the powers and duties of temporary receivers in such cases, and that an injunction order restraining creditors and all persons from commencing any suit or proceeding against the defendant, or taking any proceeding in any action already commenced, may be granted, and that upon the dissolution of the defendant, a permanent receiver of its property and assets be appointed, with all

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the rights, powers, duties and liabilities of permanent receivers in such cases; and that the plaintiffs may have such other and further relief as to the court may seem just and proper to grant, with the costs of this action.

T. E. HANCOCK,
Attorney-General,
Plaintiff's Attorney.

SUB. 3. TEMPORARY INJUNCTION. § 1787.

§ 1787. Temporary injunction.

In an action, brought as prescribed in this article, the court may, upon proof of the facts authorizing the action to be maintained, grant an injunction order, restraining the corporation and its trustees, directors, managers and other officers from collecting or receiving any debt or demand, and from paying out, or in any way transferring or delivering, to any person, any money, property or effects of the corporation, during the pendency of the action; except by express permission of the court. Where the action is brought to procure the dissolution of the corporation, the injunction may also restrain the corporation and its trustees, directors, managers and other officers, from exercising any of its corporate rights, privileges or franchises, during the pendency of the action; except by express permission of the court. The provisions of title second of chapter seventh of this act, relating to the granting, vacating or modifying of an injunction order, apply to an injunction order, granted as prescribed in this section; except that it can be granted only by the court.

See § 1806.

A court of equity has not the power to restrain an officer of a corporation from performing the general, ordinary and proper duties of his office by an *ex parte* injunction, although it may restrain him from a particular wrong affecting private rights, and may suspend or remove a trustee in certain cases. *People v. A. & S. R. R. Co.* 7 Abb. (N. S.) 265. And an officer may be restrained from the performance of any particular fraudulent act. *Howe v. Deuel*, 43 Barb. 504; *Fish v. Chi. etc. R. R. Co.* 53 Barb. 513. Corporations may be restrained in the same manner and to the same extent as individuals. *Mayor of New York v. Staten Island Ferry Co.* 64 N. Y. 622. See provisions of § 1809, requiring notice of application for injunction to suspend ordinary business of corporations, where the authorities on the subject of injunctions provided for by this title are collated.

It seems the provision with regard to temporary injunction relates only to actions brought to procure the dissolution of a corporation, and not to actions procuring judgment of sequestration. *Auburn Button Co. v. Sylvester*, 68 Hun, 401; s. c. 52 St. Rep. 180.

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Precedent for Temporary Injunction.

SUPREME COURT — QUEENS COUNTY.

THE PEOPLE OF THE STATE OF
NEW YORK, PLAINTIFFS,*agst.*THE MUTUAL BREWING COMPANY,
DEFENDANT.

On reading and filing the summons and complaint in this action, the affidavit of Hon. G. D. B. Hasbrouck, Deputy Attorney-General, and on motion of Hon. T. E. Hancock, Attorney-General, attorney for the plaintiffs, it is

Ordered, that the defendant The Mutual Brewing Company, show cause before a Special Term of this court to be held at the court house in the city of Kingston, Ulster county, on the 21st day of December, 1895, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why a temporary receiver, as prayed for in the complaint, should not be appointed of the property and assets of the said defendant The Mutual Brewing Company, with the usual powers and duties of receivers in such cases, as provided by statute, and,

It is further ordered, that the president, officers, agents and servants of the defendant The Mutual Brewing Company be and each of them is hereby enjoined and restrained from interfering with the property and assets of the defendant The Mutual Brewing Company, or the conduct of its business, and the said president, officers, agents and servants of the defendant The Mutual Brewing Company be and they are each hereby directed to transfer and turn over to said receiver all books of account, property and assets of the said defendant, The Mutual Brewing Company, of every kind and nature now in their hands or under their control.

It is further ordered that the creditors of the said corporation and all persons whomsoever having notice of this order, be and they are hereby enjoined from bringing any action against the said defendant The Mutual Brewing Company, for the recovery of any sum of money or from taking any further proceeding in such an action heretofore commenced or any further proceedings on any judgment recovered against said defendant The Mutual Brewing Company, or any execution issued thereon.

It is further ordered, that said receiver is authorized to conduct and carry on the business of the said defendant The Mutual Brewing Company, as herein provided, until further order of this court, and that the said receiver be and he is hereby authorized to apply to the court for any further instructions at any time as he may deem proper.

Let a copy of this order and the papers upon which the same is

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granted be served upon the defendant The Mutual Brewing Company, on or before the 19th day of December, 1895, and such service being made, the same shall be deemed sufficient.

ALTON B. PARKER,
Justice Supreme Court.

SUB. 4. RECEIVER. §§ 1788, 1789.

§ 1788. [Am'd, 1882.] **Receiver may be appointed; permanent and temporary receiver; powers, etc., of temporary receiver.**

In such an action, the court may also, at any stage thereof, appoint one or more receivers of the property of the corporation. A receiver, so appointed, before final judgment is a temporary receiver until final judgment is entered. A temporary receiver has power to collect and receive the debts, demands and other property of the corporation; to preserve the property and the proceeds of the debts and demands collected; to sell or otherwise dispose of the property as directed by the court; to collect, receive and preserve the proceeds thereof; and to maintain any action or special proceeding for either of those purposes. He must qualify as prescribed by law for the qualification of a permanent receiver. Unless additional powers are specially conferred upon him as prescribed in the next section, a temporary receiver has only the powers specified in this section, and those which are incidental to the exercise thereof; a receiver appointed by or pursuant to a final judgment in the action, or a temporary receiver who is continued by the final judgment, is a permanent receiver, and has all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver appointed upon the voluntary dissolution of a corporation.

§ 1789. **Additional powers and duties may be conferred upon temporary receiver.**

A temporary receiver, appointed as prescribed in the last section, is, in all respects, subject to the control of the court. In addition to the powers conferred upon him, by the provisions of the last section, the court may, by the order or interlocutory judgment appointing him, or by an order subsequently made in the action, or by the final judgment, confer upon him the powers and authority and subject him to the duties and liabilities of a permanent receiver, or so much thereof as it thinks proper; except that he shall not make any distribution among the creditors or stockholders before final judgment, unless he is specially directed so to do by the court.

The appointment of a receiver under these sections is considered in the next chapter relating to receivers, where are collated the statutes and rules relative to all receivers of corporations, their powers and duties and method of procedure in discharging the trust.

SUB. 5. WHEN ACTION MAINTAINED AGAINST STOCKHOLDERS OR OFFICERS. §§ 1790, 1791, 1792.

§ 1790. **Making stockholders, etc., parties.**

Where the action is brought by a creditor of a corporation, and the stockholders, directors, trustees or other officers, or any of them; are made liable by

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law, in any event or contingency, for the payment of his debt, the persons so made liable, may be made parties defendant by the original or by a supplemental complaint; and their liability may be declared and enforced by the judgment in the action.

§ 1791. When separate action may be brought against them.

Where the stockholders, directors, trustees, or other officers of a corporation, who are made liable, in any event or contingency, for the payment of a debt, are not made parties defendant, as prescribed in the last section, the plaintiff in the action may maintain a separate action against them to procure a judgment, declaring, apportioning and enforcing their liability.

§ 1792. Proceedings in either action.

In an action brought as prescribed in either of the last two sections, the court must, when it is necessary, cause an account to be taken of the property and of the debts of the corporation, and thereupon the defendant's liability must be apportioned accordingly; but, if it affirmatively appears, that the corporation is insolvent, and has no property to satisfy its creditors, the court may, without taking such an account, ascertain and determine the amount of each defendant's liability, and enforce the same accordingly.

In *People v. Hydrostatic Paper Co.* 88 N. Y. 623, it was held that in an action by the attorney-general to dissolve a manufacturing corporation, where it appeared that the stockholders had assets of the corporation which, to produce equality of distribution, they had no right to retain and the receiver brought up the matter at Special Term, where the stockholders appeared, that although the judgment entered went beyond the regular purposes of the action, yet as the stockholders had voluntarily appeared, the court had power to enter final judgment on the question.

It is said in *Blake v. Crowley*, 12 St. Rep. 650, that § 1790 provides for the case there before the court. This is possibly an inadvertence, since that action seems to have been between individuals, while this section relates altogether to a case where a corporation is one of the parties.

Where the return of an execution unsatisfied is the ground of proceeding against a corporation, and the effects of the corporation are not sufficient to pay its debts, the creditor may resort to equity to recover the unpaid subscriptions to capital stock. In such case each shareholder is only liable in due proportion with the other stockholders, and the bill should be filed on behalf of all the creditors against all the shareholders who have not paid up subscriptions, so that an account may be taken. *Mann v. Pentz*, 3 N. Y. 415. Where the charter made stockholders jointly and severally liable for the debts of the corporation to the amount of

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their stock, and gave creditors a right to sue therefor after demand and refusal, *held*, that a creditor could file his bill against stockholders known to him, seeking a discovery of others, and for payment of his simple contract demand. *Bogardus v. Rosendale Manufacturing Co.* 7 N. Y. 147. The receiver of an insolvent corporation represents the creditors, and may recover against the stockholders to the amount of their unpaid stock. *Van Cott v. Van Brunt*, 2 Abb. N. C. 283, reversed on merits, 82 N. Y. 535.

The effect of §§ 1790, 1792 and 1793 is considered in *Cummings v. American Gear and Spring Co.* 87 Hun, 598, where it is held, citing *Pfohl v. Simpson*, 74 N. Y. 137, that a decree can provide for the distribution of such sums as the directors may be required to pay among such creditors as are in a situation to avail themselves of the liability imposed by statute. Section 1790 and similar provisions have always formed a part of the remedies provided by statute, for the enforcement of the performance of corporate duties at the suit of the people and of the collection of corporate debts at the suit of creditors. 68 St. Rep. 653.

SUB. 6. JUDGMENT AND ITS PROVISIONS. §§ 1793, 1794, 1795.

§ 1793. Judgment; property of corporation to be distributed.

A final judgment in an action, brought against a corporation, as prescribed in this article, either separately or in conjunction with its stockholders, directors, trustees, or other officers, must provide for a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportions prescribed by law, in case of the voluntary dissolution of a corporation.

§ 1794. *Id.*; stock subscriptions to be recovered.

Where the stockholders of the corporation are parties to the action, if the property of the corporation is not sufficient to discharge its debts, the interlocutory or final judgment, as the case requires, must adjudge that each stockholder pay into court the amount due and remaining unpaid, on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the corporation.

§ 1795. *Id.*; as to liabilities of directors and stockholders.

If it appears that the property of the corporation, and the sums collected or collectible from the stockholders, upon their stock subscriptions, are or will be insufficient to pay the debts of the corporation, the court must ascertain the several sums, for which the directors, trustees, or other officers, or the stockholders of the corporation, being parties to the action, are liable; and must adjudge that the same be paid into court, to be applied, in such proportions and in such order as justice requires, to the payment of the debts of the corporation.

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It is the duty of a receiver to apply the assets or their proceeds remaining in his hands after the payment of debts entitled to a preference under the laws of the United States, and judgments, so far as they are liens upon the real estate of the corporation, equally among all the other creditors as their demands existed at the time of his appointment. *People v. Universal Life Ins. Co.* 42 Hun, 616, distinguishing *Hunt v. Knickerbocker Life Ins. Co.* 101 N. Y. 636. Independent of any statute, a court of equity has power to direct such a disposition of the fund as it shall deem best for the interests of all concerned. *Smith v. Danzig*, 3 Civ. Pro. R. 138. The creditor who brings the action gets no preference. *Morgan v. N. Y. & Albany R. R. Co.* 10 Paige, 290; *Lowne v. Am. Fire Ins. Co.* 6 Paige, 482. It is said, in *Matter of Mumay*, 6 Paige, 204, that in making distribution of the effects of an insolvent debtor or company among creditors, under insolvent laws, interest on all debts on which interest is recoverable, should be computed up to date of insolvency, and interest should be discounted on such of the debts not then due as are not drawing interest, and the dividend should be declared on the several amounts as thus ascertained. If assets afterward come into the hands of the party making payment more than sufficient to pay such sums, interest should be computed on such amounts from the date of the insolvency, so as to give each creditor a ratable proportion of the fund toward his debt. Followed, *Matter of Duncan*, 10 Daly, 95; explained and applied, *Matter of Shipman*, 61 How. 515. Officers have no preferences for salaries. *Bray v. Receiver, etc.* 1 Paige, 584. But salaries may be set off against a debt. *Matter of Croton Ins. Co.* 3 Barb. Ch. 642. A surety of a corporation has no preference. *Matter of Croton Ins. Co.* 2 Barb. Ch. 360. A lien of judgment or execution before an order for a receiver has a preference. *Matter of Waterbury*, 8 Paige, 380. Directors who, by permitting the debts to exceed the statutory limit, become liable to creditors, are entitled to the same deduction for advances after dissolution as before. *Tallmadge v. Fishkill Iron Co.* 4 Barb. 382. An order directing a receiver to pay all debts "owing to the laborers and employees for labor and services actually done in connection with its railway," was construed to mean attorney and counsel fees in litigation connected with the corporation in *Gurney v. Atlantic & G. W. R. R. Co.* 58 N. Y. 358, reversing 2 T. & C. 446.

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A proceeding to distribute the assets of a corporation among its stockholders should be an incident to the winding up of the corporation, and a single stockholder cannot maintain a proceeding for such a purpose, especially where there are debts of the corporation not yet due, and which cannot yet be paid. *Matter of Dunham*, Abb. Ann. Dig. 1882, p. 104. The appointment of a receiver of an insolvent insurance company, at a suit of a stockholder, by consent and for concealment, although erroneous, is not void, the property of the corporation passes to the receiver, and though he is superseded by another receiver appointed in an action by the attorney-general, a creditor of the corporation who recovers judgment prior to the appointment of the last receiver, acquires thereby no lien on its real estate nor preference over other creditors. *Attorney-General v. Continental Life Ins. Co.* 28 Hun, 360, citing *Osgood v. Maguire*, 61 N. Y. 524, and *Attorney-General v. Continental Life Ins. Co.* 53 How. 16. The holder of a policy in a life insurance company which matured before the appointment of a receiver, has no right to claim payment before the general distribution, though perhaps in an exceptional case the court can order it. *People v. Security Life Ins. Co.* 71 N. Y. 222. Where a corporation employed a superintendent for one year, at a fixed salary, and seven months afterward a receiver was appointed in an action to sequester, and such superintendent presented a claim for damages and asked its allowance, *held*, that he was not, at the time of the appointment of the receiver, a creditor of the corporation. That the assets were subject to claims of creditors then existing, and such claims must be first satisfied before the funds could be used for another purpose. *Eddy v. Co-operative Dress Assn.* 3 Civ. Pro. R. 442, following *People v. Globe Mutual Ins. Co.* 91 N. Y. 174, holding that as between the company and one of its officers thus contracting with it, its dissolution, by virtue of such proceedings, is to be deemed the act of the State and not the act of the corporation. The officer so contracting takes the risk of any act or neglect on the part of the officers which tends, under the law, to produce dissolution. A receiver of an insurance company cannot be compelled to pay a check drawn by the company in settlement of a loss before his appointment, out of the funds on which such check was drawn, although such funds were withdrawn from the bank by the receiver before the presentation of the check, the check not having been

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drawn on any particular fund so as to become an equitable assignment. *Merrill v. Anderson*, 71 N. Y. 325. An attorney cannot maintain an action against the receiver of an insurance company for services rendered after the appointment of the receiver on the retainer of the corporation, but the court may, on application of the attorney, in its discretion, allow a reasonable compensation. *Barnes v. Newcomb*, 89 N. Y. 108.

A lease for a term of years to a corporation is not terminated by its dissolution and the appointment of a receiver; the lessor is entitled to the subsequently accruing rent out of the fund in the hands of the receiver. *People v. National Trust Co.* 82 N. Y. 283. Annuitants of insolvent life insurance companies are to be deemed creditors for the present value of their annuities, computed upon the basis of the Northampton tables, with six per cent interest. *People v. Security Life Ins. Co.*, 78 N. Y. 114. See, however, *Attorney-General v. North American Life Ins. Co.* 82 N. Y. 172. A policy-holder who dies after the appointment of a receiver, is entitled to claim as a creditor according to the value of his policy at the time of the dissolution. *Attorney-General v. Guardian Mutual Life Ins. Co.* 82 N. Y. 336. On insolvency of a life insurance company the holders of running policies are not entitled to payment out of securities deposited under the registration acts, in preference to death claimants under registered policies. *Attorney-General v. North-Am. Life Ins. Co.* 82 N. Y. 172. As to rights of policy-holders in insolvent insurance companies, see, also, *People v. Security Ins. Co.* 23 Hun, 601; *Attorney-General v. Continental Life Ins. Co.* 88 N. Y. 77. On the insolvency of a corporation, one of its officers, who has made advances and received its bonds therefor, may prove them to the extent of such advances. *Duncomb v. N. Y. & H. R. R. Co.* 22 Hun, 133.

Where a savings bank, having money on deposit with another bank, changes it to a call loan after both banks have become insolvent, the receiver of the savings bank is estopped from questioning such acts of the bank officers, and cannot claim a preference under chapter 371, § 48, Laws 1875. *Rosenback v. M. & B. Bank*, 10 Hun, 148. affirmed, 69 N. Y. 358. Upon the application of an interested stockholder, the court will vacate a collusive judgment of dissolution, and he will be allowed to come in and defend. *People v. Hektograph Co.* 10 Abb. N. C. 358. The case of *Kin-*

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caid v. Dwinnelle, 59 N. Y. 548, holding that a judgment in an action against a corporation, that all its stock, property and effects be sequestered for the benefit of creditors, and a receiver be appointed, accompanied by an injunction restraining the corporation from the exercise of its franchises, does not actually dissolve the corporation, is followed in *Hollingshead v. Woodward*, 35 Hun, 410.

Dividends may be allowed upon a debt proven against a corporation although securities be held for it. *People v. Remington*, 54 Hun, 505, affirming 121 N. Y. 328. A lien obtained in the ordinary course by judgment or execution before the appointment of a receiver, is entitled to preference in payment. *Matter of Waterbury*, 8 Paige, 380; so, also, a dividend declared, the checks for which are made out before a fire which makes the company insolvent. *Leroy v. Globe Ins. Co.* 2 Edw. Chan. 657. As to the rights of a creditor by priority of his judgment, see *Rankin v. Elliott*, 14 How. 339, affirmed 16 N. Y. 377. Persons to be paid a fixed price for work and employing their own laborers are entitled to a preference for wages, under chapter 301, Laws 1885. *People v. Remington*, 25 St. Rep. 301, affirmed 121 N. Y. 675. The creditor who brings the action obtains no preference. *Morgan v. New York & Albany R. R. Co.* 10 Paige, 290; *Lowne v. American Fire Ins. Co.* 6 Paige, 482.

Precedent for Judgment Dissolving Corporation and Appointing Receiver.

At a Special Term of the Supreme Court of the State of New York, held at the court house in White Plains, N. Y., on the 16th day of May, 1896.

Present — Hon. J. O. Dykman, *Justice*.

THE PEOPLE OF THE STATE OF NEW
YORK, PLAINTIFF,
agst.
THE MUTUAL BREWING COMPANY,
DEFENDANT.

Judgment entered on the 19th
day of May, 1896.

The summons and complaint in this action having been duly served on the defendant The Mutual Brewing Company, Now, upon reading and filing said summons and complaint, together with due

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proof of service thereof on the defendant, and on motion of T. E. Hancock, Esq., Attorney-General, and J. Newton Fiero, Esq., of counsel for the plaintiff, and after hearing Stanley W. Dexter, representing Albert Schwill & Co., claiming to be creditors of the receiver in opposition, and after hearing C. J. Hall and W. W. Tompkins, representing C. F. Tietjen, trustee, and the West Side Bank and S. K. Nester,

It is adjudged and decreed that the defendant The Mutual Brewing Company, be and same is hereby dissolved, and its corporate rights, privileges and franchises forfeited; and that a fair and just distribution of the property thereof, and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportion prescribed by law be had.

And it is further adjudged and decreed that the defendant The Mutual Brewing Company, its trustees, directors, managers and other officers, attorneys and agents, be and each of them hereby is forever restrained and enjoined from exercising any of the corporate franchises, powers, rights or privileges of the defendant, and from collecting or receiving any debts or demands belonging to or held by the defendant, and from paying out or in any manner interfering with, transferring or delivering to any person any of the deposits, moneys, securities, property or effects of the said defendant, or held by it.

That Edward Duffy be, and he is hereby continued as receiver of all the property and effects, real and personal, of the said corporation The Mutual Brewing Company, and of all the property held by it, and that he is hereby appointed permanent receiver thereof with the usual powers and duties enjoyed and exercised by receivers according to the practice of this court, and of the statute in such case made and provided, and he is hereby authorized to take possession of and sequester the property, things in action and effects, real and personal, of the defendant herein, and to take and hold all property held by or in the possession of said defendant corporation, subject to provisions hereinafter made.

And it is further ordered and decreed, that the said receiver shall take title to such property and sell the same as now subject to the mortgage upon real estate belonging to The Mutual Brewing Company made by it in favor of Cornelia L. Marshall, for the sum of fifty thousand dollars and interest, and also subject to a certain mortgage upon a certain other portion of the real estate belonging to said Mutual Brewing Company, which mortgage bears date the 9th day of December, 1891, and upon which by a decree of the Supreme Court made in an action in which Christian F. Tietjen, as trustee, was plaintiff, and The Mutual Brewing Company and others, defendants, there was adjudged due by said decree on the 13th day of February, 1896, the sum of \$28,753.83; and also subject to the lien of a certain chattel mortgage made by the said Mutual Brewing Company on the 2d day of December, 1891, upon certain personal or chattel property of the said Mutual Brewing Company, and by which by the said decree so entered on the 13th day of February, 1896, has been declared to be a first lien upon the chattel property

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therein described; and subject also to the lien upon the personal property of The Mutual Brewing Company, which the West Side Bank and Samuel K. Nester have obtained by virtue of the issuing of executions upon the several judgments in favor of the West Side Bank and Samuel K. Nester against The Mutual Brewing Company, subject to the right of the said creditors to proceed under the decree and executions as heretofore by order of the court has been granted to them.

The said Edward Duffy, as receiver, after giving three weeks' public notice of the time and place of said sale by publishing such notice twice each week for said three weeks in a newspaper published in the county of Queens, and in one newspaper published in the city and county of New York, be, and he hereby is authorized and directed to sell at public auction at the brewery of The Mutual Brewing Company, in the village of College Point, Queens county, Long Island, New York, all the property and assets of The Mutual Brewing Company, and of one Edward Duffy, as receiver, of The Mutual Brewing Company, appointed in the action of Paul Halpin v. The Mutual Brewing Company and others.

That the sale of the assets of The Mutual Brewing Company, or receiver thereof, as herein provided, shall be subject to the liens hereinbefore specified.

It is further adjudged and decreed that such further application may be made to this court under the provisions of this decree or order as the receiver may be advised is proper and necessary for his instruction in the management and conduct of his trust.

It is further adjudged and decreed that no application shall be made to any court, nor shall any action of the court be asked or suffered by the receiver relative to or in any way connected with the duties of said receiver, or the funds or assets of the defendant above mentioned, or their transfer, sale or delivery, unless notice of such application be first given to the attorney-general of the State of New York, and copies of all orders made or procured shall be promptly served on the attorney-general as required by law, and full power is hereby conferred upon the said receiver to institute and maintain actions and suits at law in any court or courts having competent jurisdiction for the collection of debts due to the defendant and the enforcement of any rights relating to the said corporation, its property and assets.

It is further adjudged and decreed, that all money of said defendant, not needed for immediate disbursement, be immediately deposited by said receiver in People's Trust Company, Brooklyn, to the credit of said receiver, to be held by said last mentioned company subject to the further order of the court, and said money so deposited, as aforesaid, with said company shall not be delivered over by it, except subject to and in pursuance of the order of this court.

And it is further ordered, that all persons whomsoever and especially creditors of said defendant, except C. F. Tietjen, the West Side Bank and S. K. Nester, be enjoined and restrained from commencing any action or proceeding against said defendant, or from

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taking any further proceedings in any action or proceeding already commenced, except where leave of the court has been hereinbefore granted.

And it is further adjudged, that the plaintiff recover of the defendant The Mutual Brewing Company the sum of one hundred dollars costs and disbursements of this action, which said sum the said receiver is hereby directed to pay to the attorney-general.

And it is further ordered, adjudged and decreed, that the sale of the assets of such corporation shall be forthwith made and the receiver be and he hereby is authorized to continue the business until the sale thereof as hereinbefore provided, and that the receiver may charge such property as is not covered by the said liens to an amount not exceeding three thousand dollars for the purpose of preserving the property and carrying on the business, such charges to be subject to and subordinate to said liens.

(Signed.) J. O. DYKMAN,
J. S. C.

ARTICLE IV.

ACTION TO ANNUL A CORPORATION. §§ 1797-1803.

SUB. 1. ACTION, WHEN AND HOW BROUGHT AND TRIED. §§ 1797, 1798, 1799, 1800.

2. JUDGMENT, INJUNCTION AND RECEIVER. §§ 1801, 1802, 1803.

SUB. 1. ACTION, WHEN AND HOW BROUGHT AND TRIED. §§ 1797, 1798, 1799, 1800.

§ 1797. Action by attorney-general, when legislature directs.

The attorney-general, whenever he is so directed by the legislature, must bring an action against a corporation created by or under the laws of the State, to procure a judgment, vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence, upon the ground that the act was procured upon a fraudulent suggestion, or the concealment of a material fact, made by or with the knowledge and consent of any of the persons incorporated.

§ 1798. *Id.*; by leave of court.

Upon leave being granted, as prescribed in the next section, the attorney-general may bring an action against a corporation created by or under the laws of the State, to procure a judgment, vacating the charter or annulling the existence of the corporation, upon the ground that it has, either

1. Offended against any provision of an act, by or under which it was created, altered or renewed, or an act amending the same, and applicable to the corporation; or,

2. Violated any provision of law, whereby it has forfeited its charter, or become liable to be dissolved, by the abuse of its powers; or,

3. Forfeited its privileges or franchises, by a failure to exercise its powers; or,

4. Done or omitted any act, which amounts to a surrender of its corporate rights, privileges, and franchises; or,

5. Exercised a privilege or franchise, not conferred upon it by law.

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§ 1799. Leave ; when and how granted.

Before granting leave, the court may, in its discretion, require such previous notice of the application as it thinks proper, to be given to the corporation, or any officer thereof, and may hear the corporation in opposition thereto.

§ 1800. Action triable by a jury.

An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.

The power to declare a forfeiture of corporate franchises was originally, in England, vested in the courts of law, and was exercised in a proceeding brought by the attorney-general in the name of the sovereign. The Court of Chancery never assumed jurisdiction in such cases until it was conferred by an act of Parliament. It declined to exercise such jurisdiction until the power was conferred by statute to sequester corporate property. The courts of this country have followed the English system. *Decker v. Gardner*, 124 N. Y. 334.

The common law method of procedure and also procedure in chancery, for the dissolution of a corporation, has been recognized in this State. The old Code of Procedure left proceedings in equity for that purpose undisturbed. The present Code, it seems, has made provision under § 1785, and those following in article 3 of this chapter, for the exercise of the old chancery method of procedure where the whole case may be disposed of by the court without the intervention of a jury. In this article provisions are made for the commencement of actions by leave of the court. They are substantially like those contained in the old Code, and which, before that Code, were contained in the Revised Statutes. So it appears that the two systems of procedure against corporations have been continued. Under the one system, the actions may be commenced without leave of the court and they must be tried as equitable actions. This seems to be provided for in article 3, §§ 1784 to 1796. Under the other system, actions can be commenced only by leave of the court, and the parties are entitled to jury trial as matter of right. This is provided for under the present article 4 of chapter 15, §§ 1797 to 1803 inclusive. "Under the Revised Statutes, when equitable and legal remedies were administered in different courts, there was reason for the existence of the two systems, but now, when all the remedies may be administered in the same court, it is difficult to perceive any reason

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for the continued expense of the two systems, but they do exist and each must have its proper significance and operation." *Herring v. N. Y., L. E. & W. R. R. Co.* 105 N. Y. 341.

Section 1798 is not in conflict with § 1785; 1798 permits the attorney-general to bring an action against a corporation created under the laws of this State, and among the causes specified for vacating a charter of a corporation, is when a corporation has forfeited its privileges and franchises by a failure to exercise its powers. This makes no different rule from the one established in § 1785, and as to that section the attorney-general must look for a declaration as to what constitutes a forfeiture of the franchise by a failure to exercise its power. The Legislature has plainly given a period of one year, during which an omission to transact its business shall be sufficient to annul the charter. *People v. Atlantic Avenue R. R. Co.* 10 Supp. 907; s. c. 57 Hun, 378, affirmed, 125 N. Y. 513; s. c. 35 St. Rep. 872, where it is held that the provisions of § 1798 furnish no rule of liability, but simply point out the remedy to enforce duties or punish misconduct elsewhere, and otherwise determined to be such and fixes the class of cases in which, if liability does exist, such an action may be brought. It is further held that the section relates merely to procedure and does not determine, much less enlarge, existing rules of corporate liability. The vital inquiry is, what has the corporation done or omitted which brings down upon it the penalty of dissolution?

In *People v. U. & D. R. R. Co.* 128 N. Y. 240, it is said, with reference to § 1798, that a violation of the provisions of this section apparently creates a cause of forfeiture and contemplates a punishment to be inflicted upon the offender, and not a benefit to be recovered by the prosecutor. Affirming 58 Hun, 266, 34 St. Rep. 983. Attention is called to the construction placed upon this section in the opinion of Earl, J., in the *Herring case*, 105 N. Y., pages 385, etc., all concurring excepting Finch and Peckham, JJ., dissenting. Construction given to it per Finch, J., in the *Atlantic Avenue R. R. Company case*, 125 N. Y. 513, *supra*, all concurring, and the language used by Ruger, J., in *People v. U. & D. R. R. Co.* 128 N. Y. 240, all concurring. It will be noted in 125 N. Y., that Judge Finch makes no reference to the opinion of Judge Earl, in 105 N. Y., and that Ruger, Ch. J., does not refer to either opinion in 128 N. Y.

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Suits to determine the forfeiture of corporate franchises, must be at the instance and under the authority of the State. *Lorillard v. Clyde*, 61 Super. 428. In order to entitle the people to bring an action to dissolve a corporation under this section, leave of the court must be granted before such an action can be maintained. *People v. Lowe*, 47 Hun, 577. However, on appeal, 117 N. Y. 175, this decision was reversed and it was held that the court was not agreed as to the authority of the attorney-general to maintain such an action upon the facts alleged. Reference is there had to §§ 1781 and 1782 of the Code.

Section 1798 vests the attorney-general with the administrative duty of determining whether the public interests are to be subserved by instituting an action against a corporation to vacate its charter. The court will not inquire whether the bringing of such an action is a wise administrative act, but rather whether the attorney-general alleges against a corporation a *prima facie* case or a case of such gravity as it seems proper the court should determine it upon the trial. The court would withhold leave in cases plainly frivolous or where it was obvious, on inspection of the application, that none of the statutory grounds existed. *Matter of Application of the Attorney-General*, 50 Hun, 511, affirming 18 St. Rep. 122, and citing *People v. Boston, Hoosac Tunnel, etc. R. R. Co.* 27 Hun, 528.

The mere omission of a corporation to exercise its powers does not of itself, unconnected with other acts, work a forfeiture of its charter. *Attorney-General v. Bank of Niagara*, Hopk. 354. The statute merely enables parties interested to have a corporation declared dissolved; until that is done a creditor may proceed as if non-user or insolvency had not occurred. *Mickles v. Rochester City Bank*, 11 Paige, 118, affirmed 11 Paige, 129, n. If the statute provides that in case of a default the corporation shall be adjudged to have surrendered its rights and to be dissolved, the company remains *in esse* until judicially dissolved. *People v. Manhattan Co.* 9 Wend. 351; *Towar v. Hale*, 46 Barb. 361. But in *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524, it is held that if an act of incorporation shows the legislative intent to make the continued existence of a corporation depend upon its compliance with the requirements of its charter, in case of non-compliance, its powers, rights and franchises are forfeited and terminated; it is not merely a case of forfeiture which may be en-

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forced by the attorney-general. The legislature has power to provide that a corporation may lose its corporate existence without the intervention of the courts, on any omission of duty, or violation of its charter or default as to limitations imposed. But the forfeiture of rights, which have been lawfully used and enjoyed cannot be inquired of collaterally, hence it is not available as a ground for enjoining the work of a corporation at the suit of a property owner injured thereby. *Patten v. N. Y. Elevated R. R. Co.* 3 Abb. N. C. 306; appeal dismissed, 67 N. Y. 484. Mere insolvency, not shown to be continued, or a suspension of business, not shown to have been without reasonable cause, does not amount to a surrender of corporate rights on the part of a banking corporation. *People v. Bank of Hudson*, 6 Cow. 217; *Moran v. Lydecker*, 27 Hun, 582. Suffering an act to be done which destroys the end and object for which the corporation was created must be regarded as equivalent to a surrender of its rights. *Briggs v. Penniman*, 3 Cow. 387; *Slee v. Bloom*, 19 Johns. 456. The charters of business corporations imply and require that they shall perform the business for which they were instituted, and a substantial suspension of business after its commencement, like an entire omission to begin business, is a violation of a charter. *Matter of Jackson Marine Ins. Co.* 4 Sandf. Ch. 559. If the corporation have, in themselves, the power to supply the deficiency in their body, their rights are not extinguished but only dormant; but if that power is gone and they cannot act till the deficiency is supplied, the corporation is dissolved. *Phillips v. Wickham*, 1 Paige, 590. A corporation may be dissolved by forfeiture through neglect or abuse of its franchises, but such forfeiture, unless there be express provision by statute, can only be enforced by the sovereign in some proceeding instituted on its behalf. *Denike v. N. Y. & Rosendale Lime Co.* 80 N. Y. 599. An agreement, by one of the trustees of a charitable corporation, that if a certain person will procure for the corporation an appropriation by the Legislature of a certain sum, and a subsequent ratification of that agreement by the trustees, by paying over the excess, the appropriation having been obtained, *held*, an abuse of the powers of the corporation and a forfeiture of its charter. *People v. Dispensary and Hospital Society*, 7 Lans. 304. Where an action is brought to annul the charter of a railroad company, another company, which has become a lessee of part of the road, is entitled on its

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application to be made a defendant. *People v. Albany & Vermont R. R. Co.* 77 N. Y. 232. Non-compliance with the requirements of the act of incorporation, as to construction of a road, is a mis-user which forfeits; but non-compliance with conditions must be substantial. *People v. Kingston & M. T. Co.* 23 Wend. 194. To warrant a judgment against a turnpike company, after the lapse of fifty years from its incorporation and the construction of its road, for failing to comply with the statute in its original construction, for failing to keep the road in repair, the verdict must not only show a breach of the letter of the condition subsequent, but that the original neglect was material and resulted in injury to the public, or that the want of repair was such as to render the road dangerous or inconvenient to travelers. *People v. Williamsburgh T. & B. Co.* 47 N. Y. 586. It was said in *Gilman v. Greenpoint Sugar Company*, 61 Barb. 9, that a stockholder could not maintain an action against a corporation to effect a forfeiture of its charter, for disuse of its powers for a year, until after judgment of forfeiture in a suit at the instance of the attorney-general. The complaint, in an action by the people against a corporation for its dissolution alleged that the corporation was insolvent thirteen years before; that it then surrendered its property to its creditors; that ever since it had remained insolvent and neglected to pay its debts, and entirely suspended its ordinary business; that another corporation, with the same general object, had, under the authority of the State, organized and was in actual operation in its place and stead, which facts were not denied in the answer, although the alleged forfeiture was sought to be excused. *Held*, that the case was a proper case for a judgment of forfeiture dissolving the corporation and vesting its offices; as the non-user was admitted, the law allowed no excuse for the forfeiture, and there being no issue except the application of the law to the facts, plaintiff might apply for judgment at a Special Term on the pleadings. *People v. Northern R. R. Co.* 42 N. Y. 217. A forfeiture may be waived by the Legislature. *People v. Manhattan Co.* 9 Wend. 351; *Matter of N. Y. Elevated R. R. Co.* 70 N. Y. 327, affirming 7 Hun, 239, which is followed in *Central Crosstown R. R. Co. v. Twenty-third Street R. R. Co.* 54 How. 168.

An application by the attorney-general must be on written petition, signed by him, and may be made *ex parte*, although the court may direct notice to the defendant. *People ex rel. Mutual Union*

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Tel. Co. 2 McCarty, 295. Whether or not notice of the application shall be given to the corporation proposed to be made defendant rests in the discretion of the court, and its failure to require notice does not render an order invalid, nor will such an order be reviewed on appeal except where the complaint on its face shows the action is unfounded. *People v. B., H. T. & W. R. R. Co.* 27 Hun, 528. *People v. Broadway Railroad Co. of Brooklyn*, 126 N. Y. 29, reverses 56 Hun, 54, where it is held that the case as there made, came within the spirit of § 1797 and the common law which they were intended to embody. s. c. 29 St. Rep. 343, reversing s. c. 9 Supp. 6. In 26 Abb. N. C. 407, *People v. Broadway Railroad Company of Brooklyn*, is reported as reversing judgment of General Term and affirming a judgment of the Special Term, on the opinion of the court below, giving opinion of Mayham, J., as that of Special Term.

The remedy afforded for the restraint and punishment of corporations for illegal conduct in the exercise of privileges or franchises not conferred upon them by law is through an action by attorney-general to suspend their functions or annul their charters under this section. *Thomas v. Musical Mutual Protective Union*, 121 N. Y. 45; s. c. below, 49 Hun, 171; in Court of Appeals, s. c. 30 St. Rep. 363. It seems where the State seeks by an action to destroy the life of a corporation it must show some grave misconduct on the part of the latter; some sin against the law of its being, not merely formal or incidental or affecting only private interests, but material and serious, and which has produced or tends to produce injury to the public. When, however, the transgression affects the welfare of the people, they may by action summon the offender to answer for the abuse of its franchise, and ask to have its charter forfeited, and the corporation dissolved. While the statute confers upon trustees or directors of a manufacturing corporation general authority to manage its stock, property and concerns, and as between the company and those with whom it deals, the corporate action must be manifested through and by the directors, there may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both the officers and stockholders of the corporation, it is of a corporate character, and if illegal, and injurious justifies the penalty of dissolution. As between the State and the corpora-

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tion the substantial inquiry is what the collective action and agency of the officers and stockholders has accomplished. It is a violation of law for a manufacturing corporation to enter into a partnership. A consolidation of such corporations, save in the manner and as provided by statute (Chap. 960, Laws of 1867; Chap. 367, Laws of 1884), and whether made directly, or indirectly, through the medium of a trust, is unlawful and injurious to the public interests. It seems that, as corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their functions, maims and cripples their separate activity, and takes away free and independent action, affects unfavorably the public interests. *People v. North River Sugar Refining Co.* 121 N. Y. 582; s. c. 31 St. Rep. 781; s. c. below, 54 Hun, 354, which holds, page 385, that it is a condition on which a corporation is allowed to be created and maintained, that it shall exercise and use its franchises for the benefit of the public, and when it voluntarily declines to do that or places itself in a situation in which that may be prevented as a consequence of its voluntary action under the statutes as well as the decisions of the courts, it may be annulled at the suit of the attorney-general. This case is reported below, 22 Abb. N. C. 164; s. c. 27 St. Rep. 282; s. c. at circuit, 16 Civ. Pro. R. 1, and 19 St. Rep. 853; s. c. in Court of Appeals, 31 St. Rep. 781, and 18 Civ. Pro. R. 406.

Under section 798 the State must show that a case of forfeiture has not only been incurred by the defendant but that it continues to exist; that its existence involves some public interest and that the court has authorized the bringing of the action. Such an action is always within the control of the State as the sole party interested, to prosecute or abandon it at its will or pleasure, and it may, through its Legislature, not only discontinue the action but waive or abolish causes of forfeiture with their rights of action and limit the operation of the statute by forbidding the prosecution of such an action in specified cases. *People v. Ulster & Delaware R. R. Co.* 128 N. Y. 240, affirmed, 58 Hun, 266; s. c. 40 St. Rep. 280.

An action brought by the attorney-general under § 1797 to annul the charter of the corporation because it has offended against some provision of an act under which it was created, or has by violation of some provision of law forfeited its charter or

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become liable to be dissolved by the abuse of its powers, is strictly an action which may be brought in the name of the people without a relator, and one who instigates such an action, or applies to the attorney-general to have one commenced has no such interest therein and that anything done by him will affect the rights of the people to maintain an action. The simple question presented is as to whether a cause of forfeiture exists. *People v. Buffalo Stone & Cement Co.* 131 N. Y. 140; S. C. 42 Supp. 753.

The constitutional or statutory provisions for the repealing of statutes providing for the creation of corporations or the annulment of charters of corporations, do not confer power to take away or destroy property or annul contracts, and an expressed reservation of such a statute of power to take away or destroy property lawfully acquired under authority conferred by a charter and any legislation which authorizes such a result to take effect immediately, is unconstitutional and void. *People v. O'Brien*, 111 N. Y. 1.

Before leave will be given by the court for the bringing of an action to vacate the charter and annul the existence of a corporation, the attorney-general must make a written application which should point out particular act or acts done or omitted, to justify the bringing of such action and allege wherein corporations violated the laws of the State, which allegation should be supported by sufficient evidence to render it probable that a cause of action exists. The authority to commence the action will not be granted as a matter of course on the application of the attorney-general; the order in such case should specify the grounds on which the action is to be brought, since the court in granting a general order abandons all control over the action and it thus becomes possible to bring an action upon any one or all of the grounds stated or shadowed forth, or upon grounds not disclosed in the affidavits annexed to the application of the attorney-general. *Matter of Application of Attorney-General for leave to Commence an Action to Annul the Charter of the Central Stamping Co.* 81 Hun, 541, 63 St. Rep. 281, 30 Supp. 1093.

Where a corporation already in existence is granted additional franchises, the court has jurisdiction, under § 1797 and other sections of the Code, to annul the additional franchises in a proper case. *People v. Broadway Railroad Co. of Brooklyn*, 29 St. Rep. 343. In *People v. Equitable Mutual Fire Ins. Co.* 12 Misc. 556,

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67 St. Rep. 577, it is held that § 1800 provides for a trial by jury as a matter of right of actions under § 1798, and cites *People v. North River, etc. Co.* 121 N. Y. 582.

Complaint.

SUPREME COURT — STATE OF NEW YORK.

THE PEOPLE OF THE STATE OF NEW
YORK
agst.
THE NORTH RIVER SUGAR REFINING
COMPANY.

121 N. Y. 582.

The People of the State of New York, by their attorney-general, upon leave of court duly granted in this their complaint, on information and belief allege:

1. For a first cause of action, that defendant is a corporation created and organized under and pursuant to the act of the Legislature of New York passed February 17th, 1848, and entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," and the acts amendatory thereof; that defendant's certificate of incorporation filed on or about the 10th of February, 1865, declares its name to be "The North River Sugar Refining Company," its place of business in the city of New York, and its object the manufacture and sale of sugar, syrups and molasses. That in violation of law and in abuse of its powers and in the exercise of privileges and franchises not conferred upon it, defendant, on or about the first of October, 1887, in the city of New York, together with the other subscribers thereto, entered into and became a party to and carried out the following agreement, namely:

(Insert agreement.)

That thereafter and under and pursuant to the provisions of said agreement, the capital stock of defendant was transferred to said board "The Sugar Refining Company," and in lieu thereof certificates were issued by said board. That pursuant to said agreement such of the parties thereto as were not then incorporated became corporate bodies and their capital stock was transferred to said board and certificates issued in lieu thereof; that the greater part in number and value of said certificates is owned by the members of said board; that by means of said agreement and the powers thereby conferred upon the said board, said board monopolizes the manufacture and sale of refined sugar in the State of New York, and is enabled to control at will the production and price of said sugar in said State and in the United States. That in exercise of the powers conferred by said agreement, said board controls the action of defendant and the other corporations, parties to said agreement in the conduct of their business and controls and regulates the production

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and price of refined sugar in the State of New York and in the United States. That in the exercise of said powers said board has limited the production and increased the price of said sugar in said State and in said United States, and that said agreement constitutes a combination to do an act injurious to trade and commerce, to which combination defendant is a party.

2. For another and separate cause of action, plaintiffs repeating the allegations of the preceding count, aver that for and during the year 1888, defendant wilfully neglected and omitted, and still wilfully neglects and omits, to make, file and publish any report as prescribed and required by section twelve of the act by and under which defendant was created a corporation.

3. For another and separate cause of action, plaintiffs repeating the allegations of the first above count, aver that in December, 1887, defendant went out of business and ceased its operations and thenceforth to the present time omitted and neglected to refine or manufacture or sell sugar, syrups or molasses, and has failed and still fails to do any business or to exercise its powers.

Wherefore, plaintiffs demand judgment that defendant, The North River Sugar Refining Company, be dissolved, its charter vacated and its corporate existence annulled.

That it be enjoined from acting as a corporation, and a receiver of its property be appointed, and for such other and further relief as may be appropriate, with costs.

CHARLES F. TABOR,
Attorney-General,
Plaintiff's Attorney.

SUB. 2. JUDGMENT, INJUNCTION AND RECEIVER. §§ 1801, 1802, 1803.

§ 1801. Judgment.

Where any of the matters, specified in section 1797 or section 1798 of this act, are established in an action, brought as prescribed in either of those sections, the court may render final judgment that the corporation, and each officer thereof, be perpetually enjoined from exercising any of its corporate rights, privileges, and franchises; and that it be dissolved. The judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application, as prescribed in chapter seventeenth of this act.

§ 1802. Injunction may issue.

In an action, brought as prescribed in this article, an injunction order may be granted, at any stage of the action, restraining the corporation, and any or all of its directors, trustees and other officers, from exercising any of its corporate rights, privileges, or franchises; or from exercising certain of its corporate rights, privileges, or franchises, specified in the injunction order; or from exercising any franchise, liberty or privilege, or transacting any business, not allowed by law. Such an injunction is deemed one of those specified in section 603 of this act and all the provisions of title second of chapter seventh of this

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act, applicable to an injunction specified in that section, apply to an injunction granted as prescribed in this section, except that it can be granted only by the court.

§ 1803. Copy of judgment-roll to be filed and published.

Where final judgment is rendered against a corporation, in an action brought as prescribed in this article, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of State; who must cause a notice of the substance and effect of the judgment, to be published, for four weeks, in the newspaper printed at Albany, in which legal notices are required to be published, and also in a newspaper printed in the county wherein the principal place of business of the corporation was located.

Appointment of receiver under these sections will be considered under the title Receivers.

See §§ 1806, 1809, sub. 4 of next article for authorities on injunctions against corporations or officers.

ARTICLE V.

PROVISIONS APPLICABLE TO ACTIONS UNDER THIS CHAPTER.

§§ 1804-1813.

SUB. 1. EXCEPTIONS TO OPERATION OF ARTICLE. § 1804.

2. WHEN DUTY OF ATTORNEY-GENERAL TO BRING ACTION. § 1808.

3. CREDITORS MAY BE BROUGHT IN. § 1807.

4. INJUNCTION AND ITS REQUISITES. §§ 1806, 1809.

5. MISCELLANEOUS PRACTICE REGULATIONS. §§ 1805, 1811, 1812, 1813.

6. RECEIVERS. § 1810.

SUB. 1. EXCEPTIONS TO OPERATION OF ARTICLE. § 1804.

§ 1804. Certain corporations excepted from certain articles of this title.

Articles second, third and fourth of this title do not apply to an incorporated library society; to a religious corporation; to a select school or academy, incorporated by the regents of the university, or by an act of the legislature; or to a municipal or other political corporation, created by the constitution, or by or under the laws of the State.

A religious corporation, organized under the general act, consists not of the trustees alone, but of the members of the society. Such members are the corporators, the corporation is governed by the ordinary rules of the common law. A court of equity has not power to remove the trustees elected pursuant to statute, and beside the absence of authority at common law is the express provision of statute excepting religious corporations. *Robertson v. Bullions*, 11 N. Y. 243.

It was held before the Code that chancery had power independent of statutes and extending to religious corporations to

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compel trustees to execute their trusts and to remove them if necessary. *First Baptist Church v. Witherell*, 3 Paige, 296; *Kniskern v. Lutheran Churches*, 1 Sandf. Ch. 439; *Bowden v. McLeod*, 1 Edw. Ch. 588.

A lyceum for the promotion of intellectual and moral improvement was exempt from such statutory provision under 2 R. S. 466, § 57. If the trustees of a benevolent corporation agree to pay to a person procuring an appropriation from the Legislature all the moneys appropriated exceeding a specified sum, it is such an abuse of the powers of the benevolent corporation as to constitute a sufficient cause for its dissolution. *People v. Dispensary Society*, 7 Lans. 304. So far as appears by the opinion in that case the provisions of this statute were not invoked and are not passed upon. The case is cited *People v. The Broadway R. R. Co. of Brooklyn*, 126 N. Y. 44, as an authority that the court has power to declare the franchises of a corporation forfeited.

No greater restrictions have been incorporated in the Code of Procedure as they have been defined and declared by this section than existed under the Revised Statutes. Therefore corporations formed under the manufacturing laws of this State, their trustees and officers are exempted. *People v. Ballard*, 56 Hun, 125; S. C. 29 St. Rep. 926, reversed, 134 N. Y. 269.

SUB. 2. WHEN DUTY OF ATTORNEY-GENERAL TO BRING ACTION.
§ 1808.

§ 1808. When attorney-general must bring action.

Where the attorney-general has good reason to believe that an action can be maintained in behalf of the people of the State, as prescribed in article second, third, or fourth of this title, except section 1797 of this act, he must bring an action accordingly, or apply to a competent court for leave to bring an action, as the case requires; if, in his opinion, the public interests require that an action should be brought. In a case where the action can be brought only by the attorney-general in behalf of the people, if a creditor, stockholder, director, or trustee of the corporation, applies to the attorney-general for that purpose, and furnishes the security required by law, the attorney-general must bring the action, or apply for leave to bring it, if he has good reason to believe that it can be maintained. Where such an application is made, section 1986 of this act applies thereto, and to the action brought in pursuance thereof.

It will be noticed that §§ 1782 and 1797 provide specially, as to articles 2d and 3d of title 2 of chapter 15 of the Code, as to when the attorney-general shall bring an action. The provisions

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of § 1808 seem to be in addition to these specific provisions and to relate to the entire chapter.

In *People v. Ballard*, 134 N. Y. 290, 48 St. R. 166, it is said: "This section provides for two classes of actions, each of which requires two facts to exist before the action can be brought, but only one of which is common to both. Each class requires that the attorney-general should have good reason to believe that the action can be maintained. In addition to that the first class requires that he should be of the opinion that the public interests demand that an action should be brought, and the second class that one of the persons named should apply to him to bring the actions and furnish the security required by law. It is not enough to warrant the commencement of either action for the attorney-general to be satisfied that it can be maintained, for in one case he must also be satisfied that the public interests require him to act, and in the other one of the designated persons must ask him to act and give security," also quoting at page 291 from commissioners' note to this section, as confirming the construction given. S. C. below, 56 Hun, 125, 29 St. Rep. 926. Judge Ingraham, in same case at Special Term, held (3 Supp. 848) that this section is opposed to the claim that it was intended to give the attorney-general the power of instituting actions to control the trustees and directors of private corporations in the management and disposition of the corporate property.

In *People v. Lowe*, 117 N. Y. 175, 27 St. Rep. 139, it is said that this section shows that the Legislature had in mind public, not private, interests in authorizing actions of this character and that the attorney-general is expected to consult and regard public, and not private, interests in instituting them. He is to determine in the first instance whether the public interests require an action to be brought, and he may act upon his determination subject to no control, but this determination is not final, and he cannot in his discretion intrude into a mere private quarrel. The court, however, was not agreed as to the authority of the attorney-general to maintain the action in the case then before it.

It seems, however, to be settled that the attorney-general may bring an action in the name of the people without a relator, against a domestic business corporation for misconduct in *People v. Ballard*, 134 N. Y. 269; s. c. 48 St. Rep. 166. Where an application is made by a creditor, stockholder, director or trustee

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to the attorney-general under this section, provisions of § 1986, that a relator is to be joined and that security must be given, apply. *People v. Buffalo Stone & Cement Co.* 131 N. Y. 140; s. c. 42 St. Rep. 753.

In *Porter v. Industrial Information Company*, 5 Misc. 262, directors of an insolvent corporation refused to take proceedings for its dissolution so that the rights of the creditors and stockholders might be equally distributed, and there was danger that all the assets would be wiped out on executions. It appeared that all the rights of the creditors to the assets, except those of judgment creditors, might be lost unless a receiver was appointed to preserve the assets for the benefit of all. A stockholder brought an action for that purpose, which seems to have been opposed by the attorney-general upon the technical ground that an action should be brought before the dissolution of the corporation or that the corporation should take proceedings for a dissolution. It was held under these circumstances that plaintiff, the stockholder, could maintain an action for dissolution.

SUB. 3. CREDITORS MAY BE BROUGHT IN. § 1807.

§ 1807. [Am'd, 1886.] Creditors may be brought in.

In such an action, the court may, at any stage of the action, before or after final judgment, make an order requiring all the creditors of the corporation to exhibit and prove their claims, and thereby make themselves parties to the action in such a manner and in such a reasonable time, not less than six months from the first publication of notice of the order as the court directs; and that the creditors, who make default in so doing, shall be precluded from all benefit of the judgment, and from any distribution which may be made thereunder, except as hereinafter provided. Notice of the order must be given by publication in such newspapers and for such a length of time as the court directs. Notwithstanding such an order any such creditor who shall exhibit and prove his claim in the manner directed thereby, with proof, by affidavit or otherwise, that he has had no notice or knowledge thereof in time to comply therewith, any time before an order is made directing a final distribution of the assets of such corporation, shall be entitled to have his claim received, and shall have the same rights and benefits thereon, so far as the assets of such corporation then remaining undistributed may render possible, as if his claim had been exhibited and proved within the time limited by such order.

This section requires creditors to prove their claims before a referee. *People v. Remington*, 45 Hun, 349. The receiver should allow every claim which he is satisfied is justly due, but none which could not have been recovered at law or in equity. *Attorney-General v. L. & F. Ins. Co.* 4 Paige, 224. Claims not pre-

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sented and not in suit are wholly barred and precluded from sharing in the avails. *Matter of Harmony Fire Ins. Co.* 45 N. Y. 310; *People v. Security, etc. Co.* 78 N. Y. 114. When compulsory proceedings are pending for the dissolution of an insolvent corporation and distribution of its assets, and a receiver has been appointed, any creditor claiming a share must apply in such action or proceeding. *Rin v. Astor Fire Ins. Co.* 59 N. Y. 143; *Attorney-General v. North Am. Life Ins. Co.* 6 Abb. N. C. 293. Where persons were misled by statements of the receiver, and their claims were not presented in time and rejected, for that reason the receiver may properly obtain and publish an order extending the time. *People v. Security, etc. Co.* 79 N. Y. 267. Where, after the time for presenting claims against an insolvent insurance company, policy-holders died, the claims have been presented and allowed, *held*, that the court had power to direct a re-valuation of the policies, and an order denying a re-valuation for lack of power was held erroneous. *Attorney-General v. Continental, etc. Co.* 88 N. Y. 77.

SUB. 4. INJUNCTION AND ITS REQUISITES. §§ 1806, 1809.

§ 1806. Injunction staying actions by creditors.

In such an action the court may, in its discretion, on the application of either party, at any stage of the action, before or after final judgment and with or without security, grant an injunction order, restraining the creditors of the corporation from bringing actions against the defendants, or any of them, for the recovery of a sum of money, or from taking any further proceedings in such actions theretofore commenced. Such an injunction has the same effect, and, except as otherwise expressly prescribed in this section, is subject to the same provisions of law as if each creditor, upon whom it is served, was named therein, and was a party to the action in which it is granted.

§ 1809. Requisites of injunction against corporations in certain cases.

An injunction order, suspending the general and ordinary business of a corporation, or of a joint-stock association, consisting of seven or more persons, or suspending from office, or restraining from the performance of his duties a trustee, director or other officer thereof, can be granted only by the court, upon notice of the application therefor, to the proper officer of the corporation or association, or to the trustee, director or other officer enjoined. If such an injunction order is made, otherwise than as prescribed in this section, it is void.

See § 1787 as to provisions for temporary injunction under article 3 of title 2, chapter XV, Code of Procedure, and § 1802, as to injunctions under article 4.

For rule as to injunction in a peculiar case in an action to sequester, see *Syracuse Savings Bank v. S. C. & N. Y. R. R. Co.* 58 N. Y. 110.

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An injunction may be issued under § 1806 without security. *People v. Remington*, 45 Hun, 349. A special proceeding in an action by a creditor against a receiver may be enjoined, and this will be done if the action will hamper the receiver and increase expenses. *Attorney-General v. North Am. Life Ins. Co.* 6 Abb. N. C. 293. In *Attorney-General v. Guardian Mutual Life Ins. Co.* 8 Week. Dig. 65, affirmed, 77 N. Y. 272, an injunction was granted at suit of a receiver of an insurance company, appointed on the application of the attorney-general to stay a suit previously brought by a policy-holder to recover assets of the corporation. The law forbids transfer by corporations in contemplation of insolvency, and suffering a creditor to obtain judgment while the corporation is insolvent, with a view to give such creditor a preference, is illegal, as resulting in the transfer of the property of the corporation. The courts are authorized to restrain, by injunction, any creditor from proceeding at law and obtaining a preference. *Galway v. United States, etc. Co.* 21 How. 313; case on appeal, 36 Barb. 256. Upon the granting of an order of sequestration, and for the appointment of a receiver of an insolvent railroad corporation, in an action brought on behalf of all its creditors, the right of action against its stockholders for the amount of their unpaid subscription to the capital, vests in the receiver, and a judgment creditor of the corporation will be restrained from prosecuting an action against a stockholder for that purpose, commenced by him after the making of such order, but before the appointment of the receiver under it is perfected. *Rankine v. Rossie Galena Co.* 9 Paige, 598. An action by a stockholder of a corporation for a receiver thereof, and another by a judgment creditor for the sequestration of its property, is for the benefit of all concerned, and an attaching creditor, although not strictly a party, is a creditor, so that he is enjoined by a general injunction granted under this section. *Smith v. Danzig*, 3 Civ. Pro. R. 127.

Injunction will issue to restrain transfer of stock in an insolvent mining corporation; *People v. Parker Vein Co.* 10 How. 186; affirmed, 10 How. 544; *Rogers v. Michigan, etc. R. R. Co.* 28 Barb. 539; and to restrain directors from issuing bonds as a device to increase capital by their conversion into stock. *Belmont v. Erie Railway Co.* 52 Barb. 637. A corporation will be enjoined from paying a dividend not earned. *Carpenter v.*

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N. Y. & N. H. R. R. Co. 5 Abb. 277. Where stock is represented by property no harm can result to individuals or stockholders, and there is no principle of law or public policy authorizing an injunction in such a case. Injunction below vacated. *Williams v. Western Union Tel. Co.* 93 N. Y. 162. An injunction may be granted to prevent a railroad from removing its rails and abandoning its franchise. *People v. Vermont & Albany R. R. Co.* 19 How. 523. Specific acts of directors of a corporation may be enjoined. *Howe v. Deuel*, 43 Barb. 304. An injunction will not be granted restraining an officer from performing the usual and ordinary duties of his office. *People v. A. & S. R. R. Co.* 1 Lans. 308. See other decisions, 5 Lans. 25; 57 N. Y. 161. An injunction will not be granted restraining the usual and ordinary business of a corporation unless there is a plain violation of law or a departure from the powers of the corporation. *Bach v. Pacific Mail S. S. Co.* 12 Abb. (N. S.) 373. *De facto* directors of a corporation will not be enjoined from acting on the ground of want of title to the office. *People v. Conklin*, 5 Hun, 452. An action cannot be maintained either by a common or preferred stockholder in a corporation to restrain the corporation from making a contract which it has the power to make merely because it is detrimental to the interests of the plaintiff. *Thompson v. Erie R. R. Co.* 11 Abb. (N. S.) 188. If it is sought to suspend or restrain the business to conduct which the corporation was organized to carry on, as for example, in case of a railroad company, the building of a road or leasing to contractors pending construction, it is within the provisions requiring notice. *Town of Marbletown v. Rondout & Oswego R. R. Co.* 43 How. 144, affirmed, 43 How. 481. The decision of the Special Term restraining a life insurance company from prosecuting its business is not final; it may be reviewed by the General Term and Court of Appeals. *People v. Atlantic Mutual Ins. Co.* 74 N. Y. 177. An injunction to restrain the directors of a corporation from removing the treasurer and passing a resolution declaring the office vacant is void, and the objection is not waived by a motion to dissolve. *Wilkie v. Rochester & S. L. R. Co.* 12 Hun, 242. One railroad corporation may be restrained from consolidating with another; *Blatchford v. Ross*, 54 Barb. 42; and an injunction may be granted restraining the intersection of one railroad company with another. *Howlett v. N. Y., W. S. & B. R. R. Co.* 14 Abb. N. C. 328.

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Where a receiver was sued by judgment creditors of the corporation, alleging his appointment to be collusive, irregular and void, and asking his removal, and the receiver brought an action by order of the court to restrain such suit, *held*, that an injunction restraining the prosecution of the judgment creditors' action should be continued until final judgment in the action. *Smith v. Danzig*, 3 Civ. Pro. R. 127. An injunction will not lie to restrain the initiation into a society of one claimed to have been elected at a meeting illegally or fraudulently held, where no pecuniary injury is shown to be likely to result. If the election was irregular, the remedy is by summary application to the court under the statute. *Thompson v. Society of Tammany*, 17 Hun, 305. So long as the corporate rights and franchises of a corporation have not been adjudged to be forfeited in an action brought against it by the people, the fact that it is alleged to be insolvent and a receiver has been appointed in an action brought against it, does not authorize the court to restrain the receiver from proceeding to construct the road as authorized by the charter. *Moran v. Lydecker*, 27 Hun, 582. It is proper to restrain the directors and officers from collecting debts and dividends due the corporation, and from paying out or disposing of any of its property; *Morgan v. N. Y. & Albany R. R. Co.* 10 Paige, 290; and the plaintiff may apply for an injunction to restrain creditors from proceeding to obtain satisfaction for their claims at law. *Mickles v. Rochester City Bank*, 11 Paige, 118.

The court has authority, as incident to the power of appointment of a receiver to prevent any interference with the assets of the corporation, by individual creditors or otherwise, in order to preserve the fund for distribution; and it may be exercised by an order made in the suit in which the receiver is appointed; a creditor who attempts to interfere with the fund by another action cannot set up that the order is ineffectual as to him because not made in his own action. An order staying actions is not void because too broad. A motion to vacate an injunction, granted in an action in the first district, must be made in that district. *Phoenix Foundry, etc. Co. v. North River Construction Co.* 6 Civ. Pro. R. 106. The Supreme Court, having obtained jurisdiction for winding up the affairs of a corporation, and having appointed a receiver, has jurisdiction to stay the suit of a creditor brought to recover assets to which the receiver is entitled, in whatever court

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the action is pending. *Attorney-General v. Guardian Life Ins. Co.* 77 N. Y. 272.

The facts in *Moore v. New Jersey, etc. Co.* 23 St. Rep. 213, were said not to bring the case within the provisions of § 1809, but a specific injunction against other directors than the one served was omitted so as to take the question out of the case. s. c. 57 Super. 1. Where an injunction was granted against defendants, who are *de facto* trustees and last in the actual and peaceable possession of the company's office in the management of its business, it is void under the provisions of § 1809. *Ciancimino v. Mann*, 20 Supp. 702; s. c. 1 Misc. 121.

A corporation whose general and ordinary business is illegal is within the meaning of § 1809. *City of New York v. Starin*, 2 Supp. 346; s. c. 16 St. Rep. 882, 56 Super. 153. In an action by a stockholder to enjoin a railroad corporation from intersecting the road of the rail-road corporation of which plaintiff is a member, a temporary injunction may be granted without notice to the corporation about to make the intersection. Such injunction does not suspend the general and ordinary business of such corporation within the meaning of § 1809. *Howlett v. N. Y. etc. R. R. Co.* 14 Abb. N. C. 328.

SUB. 5. MISCELLANEOUS PRACTICE REGULATIONS. §§ 1805, 1811, 1812, 1813.

§ 1805. Officers and agents may be compelled to testify.

In an action, brought as prescribed in article second, third, or fourth of this title, a stockholder, officer, alienee, or agent of a corporation, is not excused from answering a question, relating to the management of the corporation, or the transfer or disposition of its property, on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will convict him of a criminal offence, or to subject him to a penalty or forfeiture. But his testimony shall not be used, as evidence against him, in a criminal action or special proceeding.

§ 1811. *Id.*; of judicial suspension or removal of an officer.

A trustee, director, or other officer of a corporation shall not be suspended or removed from office, by a court or judge, otherwise than by the final judgment of a competent court, in an action brought by the attorney-general, as prescribed in section 1781 of this act.

§ 1812. Application of the last three sections.

The last three sections apply to an action or special proceeding, against a corporation, or joint-stock association created by or under the laws of the State, or a trustee, director, or other officer thereof; or against a corporation, or joint-

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stock association, created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the corporation or association does business within the State, or has, within the State, a business agency or a fiscal agency, or an agency for the transfer of its stock.

§ 1813. In action against stockholders, misnomer, etc., not available.

Where an action, authorized by a law of the State, is brought against one or more persons, as stockholders of a corporation or joint-stock association, an objection to any of the proceedings cannot be taken, by a person properly made a defendant in the action on the ground that the plaintiff has joined with him, as a defendant in the action, a person, whose name appears on the stock-books of the corporation or association, as a stockholder thereof, by the name so appearing; but who is misnamed, or dead, or is not liable for any cause. In such a case the court may, at any time before final judgment, upon motion of either party, amend the pleadings and other papers, without prejudice to the previous proceedings, by substituting the true name of the person intended, or by striking out the name of the person who is dead, or not liable, and, in a proper case, inserting the name of his representative or successor.

Examination before trial under § 1805 has invariably been enforced without question as to the constitutional power of the Legislature to enact and provide for it. *In re Stone Bridge*, 13 Supp. 770; S. C. 37 St. Rep. 617. Section 1811 had its origin in chapter 151 of the Laws of 1870. (See commissioner's note to that section.) *People v. Ballard*, 134 N. Y. 291. Section cited *Gildersleeve v. Lester*, 52 St. Rep. 560. Section 1812 is cited in note to *People ex rel. Pennsylvania R. R. Co. v. Wemple*, 29 Abb. N. C. 99. It refers to and is to be read with § 1810 and is declaratory of the kinds of corporations which come within the provisions of such latter section. *Stevens v. Paige*, 23 Civ. Pro. R. 191; S. C. 54 St. Rep. 133, 4 Misc. 517.

Abundant authority appears for the intervention of the courts of this State, where it appears that an action is prosecuted by stockholders of an insolvent foreign corporation doing business and having assets in this State, but no officers empowered to hold such assets. *Hall v. Holland House Company*, 66 St. Rep. 684, 12 Misc. 55. By § 1812 a foreign corporation not doing business in this State nor having any business or fiscal agency therein or agency for the transfer of its stock, is excluded from the operation of § 1810 providing for the appointment of receivers of property of corporations. *Logan v. McCall Publishing Co.*, 140 N. Y. 447, 55 St. Rep. 794.

There is no necessity for filing exceptions to a report of a referee, who is appointed to take the evidence and report his

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opinion upon a claim made against an insolvent insurance company. The rule relating to filing exceptions has no application to a reference of this character. It is only to a reference which empowers a referee to decide questions between parties that the rule is applicable, and it cannot foreclose the court from passing upon matters which such court only has the power to determine. *Attorney-General v. Continental, etc. Co.* 64 How. 93.

It is the rule in actions of this kind that whenever it becomes necessary to effect a complete settlement of the affairs of the party interested, the court may at any time before or after final judgment, order such parties brought in, to the end that the whole matter in controversy may be determined. *Woodward v. Holland Medicine Co.* 39 St. Rep. 411, citing *Morgan v. New York, etc. R. R. Co.* 10 Paige, 290; S. C. 15 Supp. 128.

SUB. 6. RECEIVERS. § 1810.

§ 1810. Id.; of order appointing receiver in certain cases.

A receiver of the property of a corporation can be appointed only by the court and in one of the following cases:

1. An action brought as prescribed in article second, third or fourth of this title.
2. An action brought for the foreclosure of a mortgage upon the property of which the receiver is appointed, where the mortgage debt, or the interest thereupon has remained unpaid at least thirty days after it was payable and after payment thereof was duly demanded of the proper officer of the corporation; and where either the income of the property is specifically mortgaged or the property itself is probably insufficient to pay the mortgage debt.
3. An action brought by the attorney-general or by a stockholder to preserve the assets of a corporation, having no officer empowered to hold the same.
4. A special proceeding for the voluntary dissolution of a corporation.

Where the receiver is appointed in an action, otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation.

As to receivers see next chapter.

CHAPTER XXI.

RECEIVERS OF CORPORATIONS.*

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ARTICLE I.

STATUTORY PROVISIONS AS TO RECEIVERS OF CORPORATIONS.

§§ 1788, 1789, 1801, 1810.

The statutes relative to receivers of corporations, by reason of the necessary repeal of portions of the Revised Statutes upon the enactment of the Codes and the failure of such Codes to provide a complete system as well as on account of subsequent patch-work legislation on the subject, are in the utmost confusion, and it is exceedingly difficult to construct a system of practice from the remaining portions of the Revised Statutes, the Code of Procedure and the statutes enacted both before and since the Code, and the repealing act of 1880.

The Commissioners of Statutory Revision reported to the Legislature of 1892 a new title, consisting of 51 sections, to form

* The law relating to Receivers of Corporations is very fully discussed in Gluck and Becker on Receivers of Corporations. The matter of receivers generally is treated High on Receivers, Beach on Receivers, Kerr on Receivers and decisions on receivers in Vol. 27 of Myers' Federal Decisions.

The Precedents relative to Receivers will be found mainly at close of this chapter as more convenient in this particular instance.

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part of a new chapter XXIII of the Code intended to cover Receiverships in all cases, but it failed to receive the attention of the Legislature. The commissioners use the following language in this connection which clearly states the condition of the law on this subject:

"In the present statutes there is no well defined or well regulated system of practice upon the subject, and it is frequently difficult to determine the correct procedure to be adopted in such cases. The Code of Civil Procedure, as a general rule, provides for the cases in which a receiver may be appointed, but its provisions are found under many different heads, and do not include all the cases in which the appointment may be made, especially where there has been legislation subsequent to its adoption, as in the case of corporations annulled or dissolved by legislative enactment, which are provided for in chapter 310 of the Laws of 1886.

"The laws regulating the proceedings of receivers subsequent to their appointment, are at present mainly comprised in the eighth edition of the Revised Statutes, between pages 2672 and 2684; but with respect to receivers appointed upon the voluntary dissolution of corporations, reference must also be had to the provisions of the Revised Statutes relating to trustees of insolvent debtors, found at pages 2524 to 2526. A glance at the present condition of these laws is sufficient to demonstrate their fragmentary and incomplete character."

The general statutory provisions now in force (so far as it has been possible to collate them) relative to receivers of corporations are given below, as it is thought better to collate them here than to turn the practitioner over to the mazes of the statutes.

CODE PROVISIONS AS TO RECEIVERS OF CORPORATIONS.

§ 1788. [Am'd, 1832.] **Receiver may be appointed: permanent and temporary receiver; powers, etc., of temporary receiver.**

In such an action, the court may also, at any stage thereof, appoint one or more receivers of the property of the corporation. A receiver, so appointed before final judgment, is a temporary receiver, until final judgment is entered. A temporary receiver has power to collect and receive the debts, demands, and other property of the corporation; to preserve the property, and the proceeds of the debts and demands collected; to sell, or otherwise dispose of, the property, as directed by the court; to collect, receive, and preserve the proceeds thereof; and to maintain any action or special proceeding, for either of those purposes. He must qualify as prescribed by law, for the qualification of a permanent receiver. Unless additional powers are specially conferred upon him, as pre-

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scribed in the next section, a temporary receiver has only the powers specified in this section, and those which are incidental to the exercise thereof. A receiver, appointed by or pursuant to a final judgment in the action, or a temporary receiver who is continued by the final judgment, is a permanent receiver, and has all the powers and authority conferred, and is subject to all the duties and liabilities imposed upon a receiver appointed upon the voluntary dissolution of a corporation.

§ 1789. Additional powers and duties may be conferred upon temporary receiver.

A temporary receiver, appointed as prescribed in the last section, is, in all respects, subject to the control of the court. In addition to the powers conferred upon him, by the provisions of the last section, the court may, by the order or interlocutory judgment appointing him, or by an order subsequently made in the action, or by the final judgment, confer upon him the powers and authority and subject him to the duties and liabilities, of a permanent receiver, or as much thereof as it thinks proper; except that he shall not make any distribution among the creditors or stockholders, before final judgment, unless he is specially directed so to do by the court.

§ 1801. Judgment.

Where any of the matters, specified in section 1797, or section 1798 of this act, are established in an action, brought as prescribed in either of those sections, the court may render final judgment that the corporation, and each officer thereof, be perpetually enjoined from exercising any of its corporate rights, privileges and franchises; and that it be dissolved. The judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation, among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application, as prescribed in chapter seventeenth of this act.

§ 1810. Requisites of order appointing receiver in certain cases.

A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

1. An action, brought as prescribed in article second, third or fourth of this title.
2. An action brought for the foreclosure of a mortgage upon the property of which the receiver is appointed, where the mortgage debt, or the interest thereupon, has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded of the proper officer of the corporation; and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.
3. An action brought by the attorney-general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same.
4. A special proceeding for the voluntary dissolution of a corporation.

Where the receiver is appointed in an action, otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation.

In *Herring v. N. Y., L. E. & W. R. R. Co.* 105 N. Y. 340, Judge Earl, in the opinion of the court, commenting upon the

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existence of two remedies as contained in article 3d and article 4th of title II, chapter 15 of the Code, says: "But now when all the remedies may be administered in the same court, it is difficult to perceive any reason for the continued existence of the two systems, but they do exist and each must have its proper significance and operation." This remark is made after a discussion of the practice under the two articles in which it is said that under § 1785, etc., of article 3d, actions may be commenced without leave of the court, but that under article 4th, commencing with § 1797, actions can only be commenced by leave of the court; that this practice is substantially that under the Revised Statutes where one proceeding was upon the common-law side of the court, the other in equity; that this was continued under the Code of Procedure and has been further continued under the present Code. Under the one system actions may be commenced without leave of the court and must be tried as equitable actions, under the other they can be commenced only by leave of the court and the parties are entitled to jury trial as matter of right; though under both systems a temporary injunction may be issued and a temporary receiver may be appointed during the pendency of the action, and the final receivers are subject to the provisions of law applicable to receivers in case of voluntary dissolution of corporations whose powers and duties are regulated by law as is provided by § 1788. These provisions are as follows:

§ 2423. [Am'd, 1895.] Presentation of petition, etc.; order.

The papers must be presented at a special term of the supreme court held within the judicial district embracing the county wherein the principal office of the corporation is located. In a case specified in section 2420 of this act, the court may, in its discretion, entertain or dismiss the application. Where it entertains the application, or where the cause is one of those specified in section 2419 of this act, the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than three months after the granting of the order, why the corporation should not be dissolved. The order must be entered and the papers must be filed, within ten days after the order is made, with the clerk of the county where the principal office of the corporation is located. If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the court may at any stage of the proceeding before the final order, on motion of the petitioners on notice to the attorney-general, or on motion of the attorney-general on notice to the corporation, appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in

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section one thousand seven hundred and eighty-eight of this act. The court may also, in its discretion, at any stage in the proceeding, after such appointment, upon like motion and notice, confer upon such temporary receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings unless he is specially directed so to do by the court. If such receiver be appointed, the court may in its discretion, on like motion and notice, with or without security, at any stage of the proceeding before the final order, grant an injunction, restraining the creditors of the corporation from beginning any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it is served was named therein.

§ 2429. Final order.

Upon an application for a final order, if it appears to the court, in a case specified in section 2419 of this act, that the corporation is insolvent, or in a case specified either in that section or in section 2420 of this act, that, for any reason, a dissolution of the corporation will be beneficial to the interests of the stockholders, not injurious to the public interests, the court may make a final order, dissolving the corporation, and appointing one or more receivers of its property. Upon the entry of the order, the corporation is dissolved. The court may, in its discretion, appoint a director, trustee, or other officer, or a stockholder of the corporation, a receiver of its property.

§ 2430. Certain sales, etc. void.

A sale, assignment, mortgage, conveyance or other transfer of any property of a corporation, made after the filing of a petition as prescribed in this title, in payment of, or as security for, an existing or prior debt, or for any other consideration; or a judgment thereafter rendered against the corporation by confession, or upon the acceptance of an offer, is absolutely void, as against the receiver appointed in the special proceeding, and as against the creditors of the corporation.

By chapter 245, Laws of 1880, § 3, § 42 of title 4, chapter 8, part III, Revised Statutes, is saved from the provisions of that repealing act, and it is further enacted therein that § 42 is applicable to a permanent receiver appointed as prescribed by § 1788 of the Code. Thus § 42 of 2 R. S. page 464, is in effect and applicable to a receiver appointed in an action to dissolve a corporation, while by its terms it is only applicable to a receiver appointed in proceedings for voluntary dissolution. This section reads as amended by chapter 348, Laws 1858, as follows:

§ 42. Receiver's general powers and duties.

Such receiver shall possess all the powers and authority conferred, and be subject to all the obligations and duties imposed, in article third of this title, upon

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receivers appointed in case of the voluntary dissolution of a corporation. It shall be his duty to keep an account of all moneys received by him, and on the first days of January, April, July and October, in each and every year, to make and file a written statement, verified by his oath, that such statement is correct and true, showing the amount of money received by such receiver, his agents or attorneys, the amount he has a right to retain under the provisions of this title, and the items for which he claims to retain the same, and the distributive share due each person interested therein. He shall pay such distributive share to the person or persons entitled thereto on demand, at any time after such statement. Such accounts, statement and all the books and papers of the corporation, in the hands of such receiver shall, at all reasonable times, be open for the inspection of all persons having an interest therein. And in case of neglect or refusal to comply with either of the above requirements, or any duty imposed upon him by this title, the Supreme Court at either a general or special term, shall, on the application of the party aggrieved, unless such neglect or refusal shall be satisfactorily explained to the court, forthwith remove such receiver, and appoint some suitable person as receiver in his place. Such removal shall not vitiate or annul any legal proceedings had by such receiver; but such proceedings shall be continued by such successor, as if no removal had been made. Such receivers shall also be liable to pay to the party interested, interest at the rate of ten per cent per annum on all moneys due to such party, and retained by him more than one day after such demand made as aforesaid.

It will be noted that by § 42, a receiver under it is subject to certain provisions of Article 3 of that title which relate to voluntary dissolution. Some of these provisions were repealed by § 3, chapter 245, Laws 1880, above referred to, but §§ 66 to 89, both inclusive, in that article, were retained, and as to them it was there enacted that they should be applicable to a receiver appointed under § 2429 of the Code, being the section relative to voluntary proceedings for dissolution. Section 1788, relative to receiverships in actions for dissolution, provides that a permanent receiver appointed thereunder shall have the powers of a receiver on voluntary dissolution. § 2429.

Thus §§ 66 to 89 of Revised Statutes, above referred to, control receivers in actions and proceedings for dissolution of corporations.

These sections are as follows:

Sections 66 to 89, title 4, chapter 8, part III, R. S. :

§ 66. Receivers ; security.

Any of the directors, trustees or other officer of such corporation, or any of its stockholders, may be appointed receivers, who, before entering upon the duties of their appointment, shall give such security to the people of this State, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all moneys received by them.

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§ 67. Their rights.

Such receivers shall be vested with all the estate, real and personal, of such corporation, from the time of their having filed the security hereinbefore required, as shall be trustees of such estate for the benefit of the creditors of such corporation and of its stockholders.

§ 68. Their authority.

Such receivers shall have all the power and authority conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made, pursuant to the provisions of the fifth chapter of the second part of the Revised Statutes.

§ 69. To prosecute for arrears of stock.

If there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receivers shall immediately proceed and recover the same, unless the person so indebted shall be wholly insolvent; and for that purpose may file their bill in the court of chancery, or may commence and prosecute an action at law, for the recovery of such sum, without the consent of any of the creditors of such corporation.

§ 70. To give notice of appointment, etc.

The receivers, immediately on their appointment, shall give notice thereof, which shall contain the same matters required by law in notices of trustees of insolvent debtors; and in addition thereto, shall require all persons holding any open or subsisting contract of such corporation to present the same in writing and in detail to such receivers, at the time and place in such notice specified; which shall be published for three weeks in the State paper and in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated.

§ 71. Certain sales and transfers void.

All sales, assignments, transfers, mortgages and conveyances of any part of the estate, real or personal, including things in action of every such corporation, made after the filing of the petition for a dissolution thereof, in payment of, or as a security for, any existing or prior debt, or for any other consideration, and all judgments confessed by such corporation after that time, shall be absolutely void as against the receivers who may be appointed on such petition, and as against the creditors of such corporation.

§ 72. Debtors to account to receivers.

After the first publication of the notice of the appointment of receivers, every person having possession of any property belonging to such corporation, and every person indebted to such corporation, shall account and answer for the amount of such debt and for the value of such property to the said receivers; and all the provisions of law, in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to the receivers so appointed, and to the property of such corporation.

§ 73. Referring controversies.

Such receivers shall have the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporation, by a reference, as is given by law to trustees of insolvent debtors; and the same proceedings for that purpose shall be had, and with the like effect; and application for the appointment of referees may be made to any officer authorized to appoint

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such referees on the application of trustees of insolvent debtors, who shall proceed therein in the same manner; and the referees shall proceed in like manner, and file their report with the like effect in all respects.

§ 74. Meetings of creditors to be called, etc.

The receivers shall be subject to all the duties and obligations by law imposed on trustees of insolvent debtors, so far as they may be applicable, except where other provisions shall herein be made. They shall call a general meeting of the creditors of such corporation, within four months from the time of their appointment when all accounts and demands for and against such corporation, and all its open and subsisting contracts shall be ascertained and adjusted as far as may be, and the amount of moneys in the hands of the receivers declared.

§ 75. Subsisting contracts.

If there be any open and subsisting engagements or contracts of such corporation, which are in the nature of insurances or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same, by refunding to such party the premium or consideration paid thereon by such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement, as the whole premium bore to the whole term of such risk; and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed cancelled and discharged as against such receivers.

§ 76. Receivers' commissions.

Such receivers shall in addition to their actual disbursements be entitled to such commissions as the court shall allow, not exceeding the sum allowed by law to executors or administrators.

§ 77. Receivers to retain certain sums.

The receivers shall retain out of the moneys in their hands, a sufficient amount to pay the sums, which they are hereinbefore authorized to pay for the purpose of cancelling and discharging any open or subsisting engagements.

§ 78. Receivers to meet suits.

If any suit be pending against the corporation or against the receivers, for any demand, the receivers may retain the proportion which would belong to such demand if established, and the necessary costs and proceedings, in their hands, to be applied according to the event of such suit, or to be distributed in a second or other dividend.

§ 79. Order of payment of debts.

The receivers shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained as follows:

1. All debts entitled to a preference under the laws of the United States.
2. Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens.
3. All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.

§ 80. Second and final dividend.

If the whole of the estate of such corporation be not distributed on the first dividend, the receivers shall, within one year thereafter, and within sixteen

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months after their appointment, make a second dividend of all the moneys in their hands, among the creditors entitled thereto; of which, and that the same will be a final dividend, three weeks' notice shall be inserted once in each week, in the state paper, and in a newspaper printed in the county where the principal place of business of such corporation was situated.

§ 81. Proceedings therein.

Such second dividend shall be made in all respects in the same manner as herein prescribed in relation to the first dividend, and no other shall be made thereafter among the creditors of such corporation, except to the creditors having suits against it, or against the receivers pending at the time of such second dividend, and except of the moneys which may be retained to pay such creditors, as herein provided; but every creditor who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before such second dividend, shall receive the sum he would have been entitled to on the first dividend, before any distribution be made to the other creditors.

§ 82. Debts not exhibited.

After such second dividend shall have been made, the receivers shall not be answerable to any creditor of such corporation, or to any person having claims against such corporation, by virtue of any open or subsisting engagement, unless the demands of such creditor shall have been exhibited, and the engagements upon which such claims are founded, shall have been presented to the said receivers, in detail and in writing, before or at the time specified by them in their notice of a second dividend.

§ 83. Surplus to stockholders.

If after the second dividend is made, there shall remain any surplus in the hands of the receivers, they shall distribute the same among the stockholders of such corporation, in proportion to the respective amounts paid in by them, severally on their shares of stock.

§ 84. Money retained.

When any suit pending at the time of the second dividend shall be terminated, they shall apply the moneys retained in their hands for that purpose, to the payment of the amount recovered, and their necessary charges and expenses; and if nothing shall have been recovered, they shall distribute such moneys, after deducting their expenses and costs, among the creditors and stockholders of the corporation, in the same manner as herein directed in respect to a second dividend.

§ 85. Control of receivers.

The receivers shall be subject to the control of the court of chancery, and may be compelled to account at any time; they may be removed by the court, and any vacancy created by such removal, by death or otherwise, may be supplied by the court.

§ 86. Account by them.

Within three months after the time herein prescribed for making a second dividend, the receivers shall render a full and accurate account of all their proceedings to the court of chancery, on oath, which shall be referred to a master to examine and report thereon.

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§ 87. Previous notice thereof.

Previous to rendering such account, the receivers shall insert a notice of their intention to present the same, once in each week, for three weeks, in the State paper, and in a newspaper of the county in which notices of dividends are herein required to be inserted, specifying the time and place at which such account will be rendered.

§ 88. Master's duty.

The master to whom such account shall be referred, shall hear and examine the proofs, vouchers and documents offered for or against such account, and shall report thereon fully to the court.

§ 89. Settlement of its accounts; its effect.

Upon the coming in of such report, the court shall hear the allegations of all concerned therein, and shall allow or disallow such account, and decree the same to be final and conclusive upon all the creditors of such corporation, upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of such corporation. Such receivers shall also account, from time to time, in the same manner, and with the like effect, for all moneys which shall come to their hands after the rendering of such account, and for all moneys which shall have been retained by them for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends.

To add to this confusion it will be noticed that §§ 68 and 74 of the Revised Statutes, just quoted, provide that receivers shall have the power and authority conferred by law upon trustees of insolvent debtors pursuant to the fifth chapter of the second part of the Revised Statutes which are therefore inserted so far as they remain unrepealed by chapter 245, Laws 1880, § 2.

POWERS, DUTIES AND LIABILITIES OF ASSIGNEES AND TRUSTEES OF
INSOLVENT AND IMPRISONED DEBTORS.

§ 1. Assignees, etc., trustees for the benefit of creditors.

All assignees and trustees appointed under any authority, conferred by any of the provisions of the preceding articles of this title, in the several cases therein contemplated, are hereby declared to be trustees of the estate of the debtor, in relation to whose property they shall be appointed, for the benefit of his creditors; and shall be vested with all the powers and authority hereinafter specified, and shall be subject to the control, obligations and responsibilities hereinafter declared in respect to trustees.

§ 2. One trustee, etc.

When any one assignee or trustee, only shall be appointed, all the provisions herein contained, in reference to several trustees, shall apply to him.

§ 3. Powers of trustees where more than one.

When there are more trustees than one appointed, the debts and property of the debtor may be collected and received by any one of them; and when there are more than two trustees appointed, every power and authority conferred by this title on the trustees, may be exercised by any two of them.

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§ 4. Survivor ; property in hands of trustee dying.

The survivor or survivors of any trustees, shall have all the powers and rights given by this title to trustees. All property in the hands of any trustee at the time of his death, removal or incapacity shall be delivered to the remaining trustee or trustees, if there be any; or to the successor of the one so dying, removed or incapacitated; who may demand and sue for the same. (See Laws of 1846, ch. 158, *post.*)

§ 5. Trustees to take oath.

Before proceeding to the discharge of any of their duties, all such trustees shall take and subscribe an oath that they will well and truly execute the trust by their appointment reposed in them, according to the best of their skill and understanding; which oath shall be filed with the officer of court that appointed them.

§ 6. Trustees vested with debtor's property.

The trustees taking such oath, shall be deemed vested with all the estate, real and personal, of such debtor (except such as is exempted by the preceding articles) as follows :

1. In proceedings under the first article of this title, from the first publication of the notice to the non-resident, absconding or concealed debtor :
2. In proceedings under the second article, from the appointment of trustees.
3. In proceedings under the third, fifth and sixth articles, from the execution of the assignment, in those articles directed.
4. In proceedings under the fourth article, when the assignment was voluntary, from the time of its execution; when executed by an officer as therein directed, from the time of the first publication of the notice in that article required to be given to creditors.

§ 7. Their powers.

The said trustees shall have power,

1. To sue in their own names or otherwise, and recover all the estate, debts and things in action, belonging or due to such debtor, in the same manner and with the like effect as such debtor might or could have done if no attachment had been issued, or trustees appointed, or an assignment had not been made; and no set-off shall be allowed in any such suit, for any debt, unless it was owing to such creditor, by such debtor, before the first publication of the notice required in the first article, or before the appointment of trustees under the second article, or before presenting the petition of the insolvent under the third, fifth and sixth articles, or before publication of notice to creditors under the fourth article. But no suit in equity shall be brought by assignees of insolvents under the third, fourth or fifth articles, without the consent of the creditors having a major part of the debts which shall have been exhibited and allowed, unless the sum in controversy exceeds five hundred dollars.
2. To take into their hands, all the estate of such debtor, whether attached or delivered to them, or afterwards discovered; and all books, vouchers and securities relating to the same.
3. In the case of a non-resident, absconding or concealed debtor, to demand and receive of every sheriff who shall have attached any of the property of such debtor, or who shall have in his hands, any moneys arising from the sale of such property, all such property and moneys, on paying him his reasonable

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costs and charges, for attaching and keeping the same, to be allowed by the officer having jurisdiction.

4. From time to time, to sell at public auction, all the estate, real and personal, vested in them, which shall come to their hands, after giving at least fourteen days' public notice of the time and place of sale, and also publishing the same for two weeks in a newspaper, printed in the county, where the sale shall be made, if there be one.

5. To allow such credit on the sale of real property by them as they shall deem reasonable, not exceeding eighteen months, for not more than three-fourths of the purchase-money; which credit shall be secured by a bond of the purchaser, and a mortgage on the property sold.

6. On such sales to execute the necessary conveyances and bills of sale.

7. To redeem all mortgages and conditional contracts and all pledges of personal property, and to satisfy any judgments, which may be an incumbrance on any property sold by them; or to sell such property subject to such mortgages, contracts, pledges or judgments.

8. To settle all matters and accounts between such debtor, and his debtors, or creditors, and to examine any person touching such matters and accounts, on oath, to be administered by either of them.

9. Under the order of the officer appointing them, to compound with any person indebted to such debtor, and thereupon to discharge all demands against such person.

§ 8. Notice to be given.

The trustees, immediately upon their appointment, shall be given notice thereof; and therein shall require:

1. All persons indebted to such debtor, by a day and at a place therein to be specified, to render an account of all debts and sums of money owing by them respectively, to such trustees, and to pay the same.

2. All persons having in their possession any property or effects of such debtor, to deliver the same to the said trustees by the day so appointed.

3. All the creditors of such debtor to deliver their respective accounts and demands to the trustees or one of them, by a day to be therein specified, not less than forty days from the first publication of such notice.

§ 9. Time and manner of publishing notice.

In the case of an insolvent or imprisoned debtor, such notice shall be published for at least three weeks in a newspaper printed in the county where application was made; and in the case of non-resident, absconding or concealed debtors, it shall be published, for the same time, in the newspapers in which the notice of an attachment having issued, is directed to be printed.

§ 10. May sue notwithstanding notice.

Notwithstanding any such notice, the trustees may sue for and recover, any property or effects of the debtor, and any debts due to him, at any time, before the day appointed for the delivery or payment thereof.

§ 11. Persons concealing property or debts to forfeit double, etc.

Every person indebted to such debtor, or having the possession or custody of any property or thing in action, belonging to him, who shall conceal the same, and not deliver a just and true account of such indebtedness, or not deliver such property or thing in action, to the trustees or one of them by the day for that purpose appointed, shall forfeit double the amount of such debt, or double the

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value of such property so concealed - which penalties may be recovered by the trustees.

§ 12. When debtor, etc., may be brought up to be examined.

Whenever the trustees shall show by their own oath or other competent proof, to the satisfaction (of any officer named in the first section of the seventh article of this title, or) of any judge of a county court, that there is good reason to believe that the debtor, his wife, or any other person has concealed or embezzled any part of the estate of such debtor vested in said trustees; or that any person can testify concerning the concealment or embezzlement thereof; or that any person who shall not have rendered an account as above required, is indebted to such debtor, or has property in his custody or possession, belonging to such debtor; such officer or judge shall issue a warrant commanding any sheriff or constable, to cause such debtor, his wife, or other person, to be brought before him at such time and place as he shall appoint, for the purpose of being examined.

§ 13. Particulars of examination.

The officer issuing such warrant, shall examine every person so brought before him, on oath, in the presence of the trustees or any of them, touching all matters relative to the debtor, his dealings and estate, and touching the detention or concealment of any part of his property, and touching the indebtedness of any person to such debtor; and shall reduce the examination to writing; which the person so examined is hereby required to sign, and which shall be attested by the officer.

§ 14. Person refusing to be sworn, etc., to be committed.

If any person so brought before such officer shall refuse to be sworn, or to answer satisfactorily, all lawful questions put to him, or shall refuse to sign the examination, not having a reasonable objection thereto, to be allowed by such officer, the said officer shall by warrant commit such person to prison, there to remain without bail, until he shall submit to be sworn or to answer as required, or to sign such examination; in which warrant, the particular default of the person committed shall be specified; and if it be, in not answering any question, such question shall also be specified therein.

§ 15. Proceedings in case he brings habeas corpus.

If any person so committed shall bring a writ of habeas corpus, he shall not be discharged by reason of any insufficiency in the form of the warrant of commitment; but the court or officer before whom such person shall be brought, shall re-commit such person, unless it shall be made to appear that he hath answered all lawful questions put to him, or had sufficient reason for refusing to sign the examination, as the case may be; or unless such person shall then answer, on oath, the questions so put to him.

§ 16. Sheriff suffering such person to escape, how punished.

Any sheriff or jailor wilfully suffering any person so committed or re-committed, pursuant to the foregoing sections, to escape, shall be liable to indictment for a misdemeanor; and on conviction thereof, in addition to any other punishment the court may inflict, shall forfeit to the trustees a sum equal to the whole amount of debts due to the creditors of such debtor, not exceeding two thousand five hundred dollars.

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§ 17. Persons answering, not liable to penalty, etc.

The person so examined, and answering to the satisfaction of the officer, shall not be liable to any penalty imposed in this article for concealing and not delivering any property, or paying any debt; but his answers on such examination, may be given in evidence in the same manner, and with the like effect as if they had been made in answer to a bill in equity filed by such trustees.

§ 18. Persons discovering effects entitled to premium.

Any person who shall discover to the trustees any secreted effects, property, or things in action, belonging to such debtor, so that they shall be recovered by them, shall be entitled to ten dollars on the hundred dollars, and at that rate on the value of the effects so discovered, to be paid by the trustees, out of the estate of such debtor, but this section shall not extend to persons who have such property, effects, or things, in their own possession.

§ 19. Controversies may be referred to referees.

If any controversy shall arise between the trustees and any other person, in the settlement of any demands against such debtor, or of debts due to his estate, the same may be referred to one or more indifferent persons, who may be agreed upon by the trustees and the party, with whom such controversy shall exist, by a writing to that effect, signed by them. (Thus amended by Laws 1862, ch. 373.)

§ 20. Notice of application for appointment of referees.

If such referee or referees be not selected by agreement, then the trustees or the other party to the controversy may serve a notice of their intention to apply to the officer who appointed said trustees, or to any judge of the supreme court at chambers, residing in the same district with said trustees, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days before the time so therein specified. (Thus amended by Laws 1862, ch. 373, § 2.)

§ 21. Referees to be nominated.

On the day so specified, upon due proof of the service of such notice, the officer before whom the application is made shall proceed to select one or more referees, the same in all respects as they are now selected, according to the rules and practice of the supreme court. (Thus amended by Laws 1862, ch. 373, § 3.)

§ 22. Referee may issue commission.

When any witness to such controversy shall reside out of the county where the said trustees resided at the time of their appointment, the referee or referees appointed to hear said controversy shall have power to issue a commission or commissions in like manner as justices of the peace are now authorized to issue the same, and the testimony so taken shall be returned to the said referee or referees in the same manner and be read before them on a hearing in like manner as testimony taken on commission before justices of the peace. (Thus amended by Laws 1862, ch. 373, § 4.)

§ 23. Selection to be certified, and rule entered.

The officer, before whom they shall be selected, shall certify such selection in writing. Such certificate, or the written agreement of the parties, shall be filed by the trustees in the office of a clerk of the supreme court, when the trustees were appointed under the first article of this title; and in the said office, or in that of the clerk of the court of common pleas of the county, when the trustees were appointed under any other article of this title; and a rule shall thereupon

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be entered by such clerk in vacation or in term, appointing the persons so selected to determine the controversy.

§ 24. Powers, etc., of referees.

Such referees shall have the same powers, and be subject to the like duties and obligations, and shall receive the same compensation, as referees appointed by the supreme court, in personal actions pending therein.

§ 25. Report of referees.

The report of the referees shall be filed in the same office where the rule for their appointment was entered, and shall be conclusive on the rights of the parties, if not set aside by the court.

§ 26. Trustees to convert estate into money, accounts, etc.

The trustees shall, as speedily as possible, convert the estate, real and personal, of such debtor, into money. They shall keep a regular account of all moneys received by them as trustees; to which every creditor, or other person interested therein, shall be at liberty, at all reasonable times, to have recourse.

§ 27. When and how, to call general meeting.

The trustees, within fifteen months from the time of their appointment, shall call a general meeting of the creditors of such debtor, by a notice to be published in the same manner, as hereinbefore directed respecting the publication of the notice of their appointment; in which notice, they shall specify the place and time of such meeting, which time shall not be more than three months, nor less than two months after the first publication of such notice. Every such notice shall be published at least once in each week, until the time of such meeting.

§ 28. Proceedings at such meeting.

At such meeting, or other adjourned meeting thereafter, all accounts and demands, for and against the estate of such debtor, shall be fairly adjusted, as far as the same can be ascertained, and the amount of moneys in the hands of the trustees declared.

§ 29. Disbursements and commissions.

Out of the moneys in their hands, the trustees may first deduct all the necessary disbursements made by them in the discharge of their duty, and a commission at the rate of five per cent, on the whole sum which shall have come into their hands.

§ 32. U. S. etc., to be first paid.

They shall pay all debts due by such debtor to the United States, and all debts due by him to persons who, by the laws of the United States, have a preference in consequence of having paid money as sureties of such debtor.

§ 33. Remainder, how distributed.

They shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, in proportion to their respective demands, and without giving any preference to debts due on specialties, as follows:

1. In the case of proceedings under the first article of this title, among those who were creditors at the time of issuing the first warrant of attachment.
2. In proceedings under the third and fifth articles of this title, among those who were creditors at the time of the execution of the assignment by the insolvent.
3. In proceedings under the fourth article when an assignment was executed by an officer as therein directed among those who were creditors at the time of

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the first publication of notice to creditors to appear and determine whether they will unite in a petition; and when the assignment was voluntary, among those who were creditors at the time of the execution thereof.

4. In proceedings under the sixth article, among those creditors, at whose suit the debtor was imprisoned on execution at the time of his discharge.

§ 34. Debts due from debtor as guardian, etc.

In making such distribution, the trustees shall first pay all debts that may be owing by the debtor as guardian, executor, administrator or trustee; and if there be not sufficient to pay all debts of the character above specified, then a distribution shall be made among them, in proportion to their amounts respectively.

§ 35. Creditors whose debts are not due.

Every person to whom a debtor (excepting one proceeding under the sixth article) shall be indebted on a valuable consideration, for any sum of money not due at the time of such distribution, but payable afterwards, shall receive his proportion with other creditors, after deducting a rebate of legal interest upon the sum distributed, for the time unexpired of such credit.

§ 36. Mutual credits, etc., when set off.

Where mutual credit has been given by any debtor (except a debtor proceeding under the sixth article of this title) and any other person, or mutual debts have subsisted between such debtor and any other person, the trustees may set off such credits or debts and pay the proportion or receive the balance due. But no set off shall be allowed of any claim or debt, which would not have been entitled to a dividend, as hereinbefore directed.

§ 37. Set-offs of demand purchased.

No set-off shall be allowed by such trustees, of any claim or debt, which shall have been purchased by, or transferred to, the person claiming its allowance, which could not have been set-off by him, according to the provisions of this article, in a suit brought by such trustees.

§ 38. Suits pending. Proportion to be retained.

If, at the time any dividend is made, any prosecution be pending against the trustees, in which a demand against such debtor may be established, the trustees may retain in their hands, the proportion which would belong to such demand if established, and the necessary costs and expenses of such suit or proceeding, to be applied according to the event of such proceeding or suit, or to be distributed in a second or other dividend.

§ 39. Penalties recovered by trustees.

All penalties which shall be recovered by any trustees, pursuant to the provisions of this title, shall be deemed a part of the estate of the debtor, and shall be distributed as such among his creditors.

§ 40. If whole estate not distributed on first dividend, yearly dividends to be made.

If the whole of such debtor's estate be not distributed on the first dividend, the trustees shall, within one year thereafter, make a second dividend of all the moneys belonging to the estate of the debtor, then in their hands, among the creditors entitled thereto, as hereinbefore specified; and in the same manner from year to year, so long as any moneys belonging to the estate of such debtor, shall remain in the hands of the trustees, they shall make a dividend thereof among the creditors entitled thereto.

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§ 41. Creditors omitting to deliver accounts on first dividend, etc.

Any creditor who shall have neglected to deliver to the trustees on account of his demand, before the first, second, third, or other dividend, and who shall deliver his account to them before the second or other subsequent dividend, shall receive the sum he would have been entitled to, on any former dividend, before any distribution be made to other creditors.

§ 42. Unclaimed dividends.

If any dividend that shall have been declared shall remain unclaimed by the person entitled thereto for one year after the same was declared, the trustees shall consider it as relinquished, and shall distribute it, on any subsequent dividend, among the other creditors.

§ 43. Surplus to be paid to debtor.

If after settling the estate of any debtor, and after discharging his debts, entitled to a dividend, any surplus shall remain in the hands of his trustees, the same shall be paid to such debtor or his legal representatives.

§ 44. Allowance to certain debtors.

Every debtor who shall be discharged under the third, fourth or fifth articles of this title, shall be allowed the sum of five per cent, on the net produce of all his estate, that shall be received by the assignees, to be paid to him by them, in case such net produce, after such allowance made, shall be sufficient to pay the creditors of such debtor, entitled to a dividend, the sum of seventy cents on the dollar, on the amount of their debts respectively, as the same shall have been ascertained; but the said allowance shall not exceed in the whole the sum of five hundred dollars.

§ 45. Trustees to render account on oath.

Within ten days after any dividend made by any trustees, they shall render on oath, and file with the clerk of the court of common pleas of the county in which they reside, or with a clerk of the supreme court, an account in writing of all their proceedings in the premises; stating,

1. Their disbursements, commissions, and the dividends made by them.
2. The names and residences of the creditors to whom dividends were made, and the names of those actually receiving them.
3. The property, moneys and effects of the debtor remaining in their hands, and the value and situation of such property.

And such trustees may at any time be compelled by a rule of the supreme court, or of the court of common pleas of the county in which they reside, to render such account on oath, on the application of the debtor, or of any creditor.

§ 46. Trustees subject to order of courts; may be removed.

Such trustees shall be subject to the order of the supreme court, and of the court of common pleas of the county in which they were appointed, upon the application of any creditor, or of any debtor in respect to whom they were appointed, in relation to the execution of any of the powers and duties confided to them; and they may be removed by the supreme court for cause shown.

§ 47. Proceedings in common pleas removable into supreme court.

Whenever any authority shall be exercised by a court of common pleas, or any officer, pursuant to any provisions of this title, the proceedings may be removed into the supreme court by certiorari, and there examined and corrected.

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But no such certiorari shall issue, unless allowed by a justice of the supreme court, or a circuit judge; nor shall it operate as a stay of proceedings, unless it shall be so directed in the order of allowance.

§ 48. If trustee be removed, etc., new trustee may be appointed.

Whenever any trustee shall be removed, or shall die, or become incapacitated to perform his duties, the officer who originally appointed such trustee, or in case of his absence, death, or removal, any other officer residing in the county where such trustee was resident, who by law would have been empowered to make such appointment, after giving notice, and an opportunity to the creditor to propose proper persons, may appoint another in the place of such trustee, who shall, in all respects, have the like powers and authority, and be subject to the same control, obligations and responsibilities; and the said appointment shall be certified and recorded, as the original appointment was required to be recorded.

§ 49. Trustee wishing to renounce, may obtain order to show cause.

Any trustee appointed pursuant to the provisions of this title, who shall be desirous of renouncing the trust vested in him, may apply to the officer, or court from whom his appointment was received, for an order to all persons interested, to show cause why such renunciation should not be accepted.

§ 50. Id.; application to whom made.

If the officer who made such appointment shall not then be in office, such application may be made to a circuit judge, supreme court commissioner, or the first judge of the county, residing in the same county where the appointment of such assignee was made.

§ 51. Application to be accompanied by account.

Such application shall be accompanied by a full, true and just account of all the transactions of such trustee, in that character, and particularly of the property, moneys and effects received by him; of all payments made, whether to creditors or otherwise; and of the remaining effects and estate of the debtor, in respect to whom, or whose estate, he was appointed trustee, within his knowledge, and the situation of the same.

§ 52. Affidavit to be annexed.

To such account shall be annexed the affidavit of the trustee, that the said account is in all respects just and true, according to the best of his knowledge and belief; which affidavit shall be subscribed and sworn to, before the officer, or court, to whom the application is made, and shall be certified by him, or by the clerk of the court.

§ 53. Notice to show cause.

Such officer, or court, shall thereupon grant an order, directing notice to be given to all persons interested in the estate of the debtor, in respect to whom or whose estate such trustee was appointed, to show cause on a day or at a term and at a place therein to be specified, why he should not be permitted to renounce his appointment.

§ 54. Notice to be published.

Such notice shall be published, once in each week, for six weeks successively, in the state paper, and in such other newspapers, as such officer or court shall direct.

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§ 55. Hearing.

On the day appointed for such hearing, and on such other days as shall from time to time be appointed, if it shall appear that notice was duly published, the officer or court shall proceed to hear the proofs and allegations of the parties.

§ 56. When trustee may be allowed to renounce.

If it shall appear that the proceedings of such trustee, in relation to his trust, have been fair and honest, and particularly in the collection of the property and debts vested in him; and if such court or officer be satisfied that for any reason, it is inexpedient for such trustee to continue in the execution of the duties of his appointment, and that such duties can be executed by another trustee, without injury to the estate of the debtor, or to the creditors; and if no good cause to the contrary appear, such officer or court shall grant an order, allowing such trustee to renounce his appointment, and to assign the property and effects of the debtor.

§ 57. Trustee to execute assignment.

Such assignment shall be executed by such trustee, to such person, or persons, as the court or officer shall appoint for that purpose; and in the appointment, such person as shall have been named to be assignees by the creditors of such debtor, or by the major part of them, shall be preferred, if approved by such court or officer.

§ 58. Effect of assignment; powers, etc. of new assignee.

Such assignment shall transfer to the persons to whom it shall be made, all the remaining estate and effects, vested in the trustees so renouncing; and such new assignee shall have the same powers, be subject to the same duties, and be entitled to the same compensation, as the original trustee, and shall continue any suit that may have been commenced by such original trustee, in his name, or in that of such new assignee.

§ 59. When order to be made discharging trustee.

Upon producing to the officer or court allowing such assignment, the certificate of the assignee, duly proved by the oath of a subscribing witness, that such assignment has been duly made, and the property capable of delivery, belonging to such debtor, together with all the books, vouchers and documents, relating to the estate of such debtor, has been duly delivered; and also a certificate of the county clerk, that such assignment has been recorded; such court or officer shall grant to the trustee so applying an order that he be discharged from his trust.

§ 60. Trustee thereupon discharged, subject to prior liabilities.

Upon such order being granted, such trustee shall be discharged from the trust reposed in him, and his power and authority shall thereupon cease; but he shall, notwithstanding, remain subject to any liability he may have incurred, at any time previous to the granting of such order, in the management of his trust.

§ 61. Assignment, petition. etc., to be recorded and filed.

Such new assignment, upon being duly proved or acknowledged, shall be recorded in the office of the clerk of the county where such order was granted; and the petition of the trustee, the affidavit and proceedings thereon, with the certificate of the new assignee, shall be filed in the same office where the original papers and proceedings, in respect to such debtor, were filed.

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§ 62. Expenses to be paid by trustee.

The expense of all proceedings in effecting such renunciation and assignment, shall be paid by the trustee making the application.

The provisions of the Code, §§ 713, 714, 715, and 716, apply to receivers of corporations and are as follows:

§ 713. [Am'd, 1895.] Receiver; when appointed.

In addition to the cases, where the appointment of a receiver is specially provided for by law, a receiver of property, which is the subject of an action, in the supreme court or a county court, may be appointed by the court, in either of the following cases:

1. Before final judgment, on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed.

2. By or after the final judgment, to carry the judgment into effect, or to dispose of the property, according to its directions.

3. After final judgment, to preserve the property, during the pendency of an appeal.

The word, "property," as used in this section, includes the rents, profits, or other income, and the increase, of real or personal property.

§ 714. [Am'd, 1879.] Appointment of receiver; notice of application.

Notice of an application, for the appointment of a receiver, in an action, before judgment therein, must be given to the adverse party, unless he has failed to appear in the action, and the time limited for his appearance has expired. But where an order has been made, as prescribed in section four hundred and thirty-eight of this act, the court may, in its discretion, appoint a temporary receiver, to receive and preserve the property, without notice, or upon a notice given by publication or otherwise, as it thinks proper.

§ 715. [Am'd, 1896.] Security.

A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this State to transact business, shall be equivalent to the execution of said bond by two sureties. And the court, or, where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may, at any time, remove the receiver, or direct him to give a new bond, with new sureties, with the like condition. But the foregoing provisions of this section do not apply to a case where special provision is made by law, for the security to be given by a receiver, or for increasing the same, or for removing a receiver. A receiver who, having executed and filed a bond as provided for in this section, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his intention to present his accounts, not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a

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person or persons other than the receiver, and in no case shall the receiver's accounts be passed, settled or allowed, unless the said notice provided for in this section shall have first been given to the surety or sureties on the official bond of such receiver.

§ 716. [Am'd, 1895.] Certain receivers may hold real property.

A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court, or a county court, or in a special proceeding for the voluntary dissolution of a corporation, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

Chapter 314, Laws of 1858, as amended by Chapter 740, Laws of 1894, authorizes certain actions to be brought by receivers:

§ 1. Trustees, etc., may impeach assignments.

That any executor, administrator, receiver, assignee or trustee of an estate, or the property and effects of an insolvent estate, corporation, association, partnership or individual, may for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void, and resist all acts done, transfers, and agreements made, in fraud of the rights of any creditor, including themselves and others, interested in any estate or property held by or of the right belonging to any such trustee or estate. And any creditor of a deceased insolvent debtor, having a claim or demand against the estate of such deceased debtor exceeding in amount the sum of one hundred dollars, may, in like manner, for the benefit of himself and other creditors interested in the estate or property of such deceased debtor, disaffirm, treat as void, and resist all acts done, and conveyances, transfers and agreements made, in fraud of the right of any creditor or creditors, by such deceased debtor, and for that purpose may maintain any necessary action to set aside such acts, conveyances, transfers or agreements; and for the purpose of maintaining such action, it shall not be necessary for such creditor to have obtained a judgment upon his claim or demand, but such claim or demand, if disputed, may be proved and established upon the trial of such action. And the judgment may provide for the sale of the premises or property, when any conveyance or transfer of the same is set aside and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law.

§ 2. And have actions against offenders.

That every person who shall, in fraud of the rights of creditors and others, have received, taken, or in any manner interfered with, the estate, property or effects of any deceased person, or insolvent corporation, association, partnership or individual, shall be liable in the proper action to the executors, administrators, receivers, or other trustees of such estate or property, for the same, or the value of any property or effects so received or taken, and for all damages caused by such acts to any such trust estate.

In 1880 an act was passed relating to receivers of insolvent corporations regulating very many matters of practice and requiring notice of proceedings to be given to the attorney-general. Receivers' Law, chapter 537, Laws 1880:

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§ 1. Copy report to be served on attorney-general.

All receivers of insolvent corporations who are now required by law to make and file reports of their proceedings shall hereafter, at the time of making and filing such reports, serve a copy thereof upon the attorney-general of this state, and receivers of such corporations as reported to, and were under the supervision of, the banking department, prior to their appointment as such receivers, and who have not been discharged from their respective trusts, and all receivers of such corporations, that may hereafter be appointed, shall on the first day of January and July of each year, during the continuance of their respective trusts file with the superintendent of the banking department a report, verified by oath, in such form as the superintendent may prescribe, showing the condition of their respective trusts. (Thus amended by Laws 1881, chap. 639.)

§ 2. Motion by attorney-general to compel making report, etc.

In case any receiver of an insolvent corporation shall neglect to make and file a report of his proceedings for thirty days after the time he is now required by law to make and file such report, or shall neglect for the same length of time to serve a copy thereof on the attorney-general, as required by the first section of this act, the attorney-general may make a motion in the supreme court for an order to compel the making and filing and serving a copy on him of such report, or for the removal of such receiver from his office.

§ 3. Attorney-general may move for order removing receiver, etc.

The attorney-general may, at any time he deems that the interest of the stockholders, creditors, policy-holders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court at a special term thereof, in any judicial district, for an order removing the receiver of any insolvent corporation, and appointing a receiver thereof in his stead, or to compel him to account, or for such other or additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and any appeal from any order made upon any motion under this section shall be to the general term of said court of the department in which such motion is made. (Thus amended by Laws 1882, chap. 331, § 1.)

§ 4. Notices, etc., must be served on attorney-general.

A copy of all notices of motion and of all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding now pending for the dissolution of a corporation or a distribution of its assets, or which shall hereafter be commenced for such purpose, shall in all cases be served on the attorney-general, in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this law would be *ex parte* or upon notice, and no order or judgment granted shall vary in any material respect from the relief specified in such copy, order or judgment, unless the attorney-general shall appear on the return day and have been heard in relation thereto; and any order or judgment granted in any action or proceeding aforesaid without such service of such papers upon the attorney-general, shall be void, and no receiver of any such corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days, after

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a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general. (Thus amended by Laws 1882, chap. 331, § 2.)

[Laws 1882, chap. 331, § 3. The provisions of this act shall only apply to actions and special proceedings heretofore instituted by the attorney-general and to such as shall hereafter be instituted by him for the purpose aforesaid.]

Still another act was passed in 1883, chapter 378, which is as follows:

§ 1. Where application for appointment of a receiver to be made.

Every application hereafter made for the appointment of a receiver of a corporation, other than applications made by the attorney-general on behalf of the people of the state, shall be made at a special term of the supreme court, held in and for the judicial district in which the principal business office of the corporation is located; and all such applications made by the attorney-general shall be made in the judicial district in which the action in which the appointment is sought is triable; and any action or proceeding hereafter brought by the attorney-general on behalf of the people of the state against any corporation for the purpose of procuring its dissolution, the appointment of a receiver, or the sequestration of its property, may be brought in any county of the state, to be designated by the attorney-general. (Thus amended by Laws 1896, chap. 282.)

§ 2. Compensation of receivers; division in certain cases.

Every receiver shall be allowed to receive, as compensation for his services as such receiver, five per centum for the first one hundred thousand dollars, actually received and paid out, and two and a half per centum on all sums received and paid out in excess of the said one hundred thousand dollars. But no receiver shall be allowed or shall receive from such percentages or otherwise, for his said services for any one year, any greater sum or compensation than twelve thousand dollars, nor for any period less than one year more than at the rate of twelve thousand dollars per year, provided that where more than one receiver shall be appointed, the compensation herein provided shall be divided between such receivers. (Thus amended by Laws 1886, chap. 275.)

§ 3. Order to designate place of deposit.

All orders appointing receivers of corporations shall designate therein one or more places of deposit, wherein all funds of the corporation not needed for immediate disbursement shall be deposited, and no deposits or investments of such trust funds shall be made elsewhere, except upon the order of the court upon due notice given to the attorney-general.

§ 4. Receiver to report in detail receipts and expenses every six months.

It shall be the duty of every receiver of an insurance, banking, or railroad corporation, or trust company, to present every six months to the special term of the supreme court, held in the judicial district wherein the place of trial or venue of the action or special proceeding in which he was appointed may then be, on the first day of its first sitting, after the expiration of such six months, and to file a copy of the same, if a receiver of a bank or trust company with the bank superintendent, if a receiver of an insurance company, with the superintendent of insurance, and in each case with the attorney-general, an account exhibiting in detail the receipts of his trust, and the expenses paid and incurred therein during the preceding six months; and it shall be unlawful for any receiver of the character specified in this section to pay to any attorney or counsel

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any costs, fees or allowances until the amount thereof shall have been stated to the special term in this manner, as expenses incurred, and shall have been approved by that court, by an order of the court duly entered; and any such order shall be the subject of review by the appellate division and the court of appeals on an appeal taken therefrom by any party aggrieved thereby. Of the intention to present such account as aforesaid, the attorney-general and also the surety or sureties on the official bond of such receiver shall be given eight days' notice in writing; and the attorney-general shall examine the books and accounts of such receiver at least once every twelve months. (Thus amended by Laws 1896, chap. 139.)

§ 5. **Intervenors to pay their own expenses.**

In case of the intervention of any policy-holder or depositor, by permission of the court, such policy-holder or depositor shall defray the legal expenses thereof, and no allowance shall be made for costs or fees to any attorney of such policy-holder or depositor.

§ 6. **Affairs to be closed up within one year.**

The affairs of every insolvent corporation now in the hands of any receiver shall be fully closed up by the receiver thereof within one year from the passage of this act unless the court, upon application by said receiver and upon due notice to the attorney-general, shall give additional time for that purpose.

§ 7. **Attorney-General may apply to have receiver removed, etc.**

The attorney-general may, at any time he deems that the interest of the stockholders, creditors, policy-holders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court, at a special term thereof, in any judicial district, for an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead, or to compel him to account, or for such other and additional order or orders as to him may seem proper to facilitate the closing up of the affairs of such receivership, and any appeal from any order made upon any motion under this section shall be to the general term of said court of the department in which such motion is made.

§ 8. **Copies of all papers to be served on attorney-general.**

A copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding now pending for the dissolution of a corporation or a distribution of its assets, or which shall hereafter be commenced for such purpose, shall, in all cases be served on the attorney-general, in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this law would be *ex parte* or upon notice, and no order or judgment granted shall vary in any material respect from the relief specified in such copy or order, unless the attorney-general shall appear on the return day and have been heard in relation thereto; and any order or judgment granted in any action or proceeding aforesaid, without such service of such papers upon the attorney-general, shall be void, and no receiver of any such corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days after a certified copy of such

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order or judgment shall have been served as aforesaid upon the attorney-general.

§ 9. Where applications to be made.

All applications to the court, contemplated by this act, shall be made in the judicial district where the principal office of the corporation against which proceedings are taken is located, excepting such applications as are made in actions brought by the attorney-general on behalf of the people of the state, and all such applications shall be made in the judicial district in which the action is triable. (Thus amended by Laws 1896, chap. 282.)

§ 10. Preference on calendars.

All actions or other legal proceeding and appeals therefrom or therein brought by or against a receiver of any of the insolvent corporations referred to in this act, shall have a preference upon the calendars of all courts next in order to actions or proceedings brought by the people of the State of New York.

§ 11. Repeal.

All acts or parts of acts inconsistent herewith are hereby repealed.

By Laws of 1884, chapter 285, provision was made for vesting of title to real estate in receivers of corporation. Section 2 relates exclusively to transfer of securities by life insurance company, and is therefore omitted.

§ 1. All property, etc., to vest in receiver except as to insurance companies.

In all cases where receivers have been or shall be appointed for any corporation of this state other than an insurance company on application by the attorney-general, all property, real and personal, and all securities of every kind and nature belonging to such corporation, no matter where located or by whom held, shall be transferred to, vested in and held by such receiver; provided, however, that such transfer shall only be made when directed by an order of the supreme court, due notice of the application for such order having been made on the attorney-general and the custodian of the funds, securities or property.

By chapter 376, Laws of 1885, receivers of corporations were directed to prefer wages of laborers:

§ 1. Wages of operatives preferred to other debts.

Where a receiver of a corporation created or organized under the laws of this State and doing business therein, other than insurance and moneyed corporations, shall be appointed, the wages of the employees, operatives and laborers thereof shall be preferred to every other debt or claim against such corporation, and shall be paid by the receiver from the moneys of such corporation which shall first come to his hands.

In 1886 special provision was made for receiverships of corporations dissolved by the Legislature, chapter 310, Laws of 1886. As this was passed for a special exigency it is omitted here. See *People v. O'Brien*, 111 N. Y. 1, as to constitutionality.

Chapter 222, Laws 1842, relates to receivers of certain banks only.

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Chapter 71, Laws of 1852, was repealed as to § 1 by chapter 245, Laws of 1880. Section 2 relates only to receivers of mutual insurance companies.

Rule 80, Supreme Court regulates the time and place of application for receivers of corporations:

Rule 80. All motions for the sequestration of the property of corporations, or for the appointment of receivers thereof, must be made in the judicial district in which the principal place of business of said corporations, respectively, is situated, except that in actions brought by the attorney-general in behalf of the people of this State, when it shall be made to appear that such sequestration is a necessary incident to the action, and that no receiver has already been appointed, a motion for the appointment of one may be made in any county within the judicial district in which such action is triable. No motion can be made, or other proceeding had for the removal of a receiver, elsewhere than in the judicial district in which the order for his appointment was made. And where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property in which a receiver is necessary.

It is said in *Smith v. Danzig*, 3 Civ. Pro. R. 127; s. c. 64 How. 320, that this rule is in contravention of the provisions of the Code of Procedure, but *United States Trust Co. v. N. Y., W. S. & B. Co.* 101 N. Y. 478, holds the statute, chapter 378, Laws of 1883, supersedes the Code on this point.

Rule 81, as to employment of counsel by receivers, seems to relate to receivers of all kinds.

ARTICLE II.

JURISDICTION TO APPOINT RECEIVER UNDER THE DECISIONS AND WHEN EXERCISED.

SUB. 1. JURISDICTION OF COURT TO APPOINT RECEIVER.

2. WHEN COURT WILL APPOINT RECEIVER.

SUB. 1. JURISDICTION OF COURT TO APPOINT RECEIVER.

The provisions for the appointment of a receiver of a corporation as heretofore given at length are,—Section 1788 of Code in an action to dissolve a corporation as authorized by § 1785. This action is maintained as a matter of right on proof of the required facts under that section, and the receiver is either temporary or permanent with reference to his appointment either before or after judgment.

Again a receiver may be appointed by the terms of § 1801 of the Code by the final judgment where the action is brought under

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§§ 1797 and 1798 to annul a corporation. This section seems to provide for a permanent receiver only.

Again, by § 1810, a receiver may be appointed, where the action is brought under articles 2d, 3d or 4th of the title. This includes actions under § 1781 against directors for misconduct and also includes the two cases just referred to, viz., where actions are brought under §§ 1785 and 1797 and 1798, respectively, covering the same cases apparently as already provided for by §§ 1788 and 1801, and in addition it provides for a receiver in an action for foreclosure of a mortgage against a corporation and also where an action is brought under certain circumstances to preserve the assets of a corporation, and still further in a special proceeding for the dissolution of a corporation. This latter proceeding is provided for by §§ 2419 to 2431, and by § 2423 it is again provided that a temporary receiver may be appointed in such case, and by § 2429 a permanent receiver is provided for on such voluntary dissolution.

Section 713 is a general provision for appointment of receivers in the cases specified therein.

In *King v. Barnes*, 51 Hun, 550, affirmed without opinion, 113 N. Y. 655, it is held that these provisions are not exclusive of the right to appoint a receiver to carry into execution the judgment of the court, that in such case receivers are appointed on general principles of equity, independent of all statutory provisions. They are common-law receivers, custodians of the property only.

In *Holland Trust Company v. Consolidated Gas and Electric Light Co.* 85 Hun, 454, it was held that the case presented fell within subd. 2 of § 1810 of the Code, and that the receiver whose appointment was authorized by that subdivision is only a receiver of the mortgaged property, that the practice and power of the court is therefore substantially the same as it was in equity or chancery before these provisions of the Code. It was further held that in a proper case a receiver should be appointed upon the foreclosure of a mortgage given by the corporation although the receiver had previously been appointed in the same action in an action instituted for the foreclosure of a junior mortgage.

It is quite clear from the opinion in *Decker v. Gardiner*, 124 N. Y. 334, that there is no inherent power in a court of equity to appoint a receiver of a corporation, but in a foreclosure action a receiver of the property mortgaged may be appointed. Such

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an appointment is incidental to the equity powers of the court, but the distinction lies in the extent of his powers, the receiver of mortgaged property being appointed as in case of an individual mortgagor and the receiver being limited to the control of that property. It is further held that the Court of Chancery never assumed this jurisdiction as to corporations as such until conferred by statute, and that this rule has been followed in this country and is now a matter of statutory regulation, citing *Attorney-General v. Utica Ins. Co.* 2 Johns. Ch. 389; *Slee v. Bloom*, 5 Johns. Ch. 366; *Attorney-General v. Bank of Niagara*, Hopk. Ch. 354.

Bangs v. Duckinfield, 18 N. Y. 592, is often cited as an authority to the contrary, but on examination it will be found the decision is placed upon the ground that the action of the court in such case was erroneous but not void. The syllabus is misleading.

The jurisdiction of chancery did not extend to the sequestration of property of a corporation by means of a receiver, or to the winding up of its affairs, or to control or restrain the usurpation of franchises by corporate bodies, or by persons claiming, without right, to exercise corporate powers. Receivers in this State act under statutory authority which prescribes their authority and duties. *Attorney-General v. Utica Ins. Co.* 2 Johns. Ch. 371; *Attorney-General v. Bank of Niagara*, Hopk. 354; *Belmont v. Erie Railroad*, 52 Barb. 637; *Waterbury v. Merchants' Union Exc. Co.* 50 Barb. 157; *Bangs v. McIntosh*, 23 Barb. 591. Although in *Lawrence v. Greenwich Ins. Co.* 1 Paige, 587, and *Leavitt v. Yeates*, 4 Edw. Ch. 173, chancery exercised the power in peculiar cases, a court of equity in the absence of statute, has no authority to dissolve a corporation. *Slee v. Bloom*, 20 Johns. 669. And the statutes granting such powers are strictly construed. *In re Pyrolusite Manganese Co.* 29 Hun, 429; *Lchigh Coal Co. v. Central R. R. of N. J.* 43 Hun, 546. The jurisdiction of the court to appoint receivers has for its primary object the care and custody of the property which is the subject of the receivership, pending the determination involved in the litigation, and to enable the court, by placing the property under the control of its officers to pursue it, to answer the final decree which may be made in the action. *Vilas v. Page*, 11 St. Rep. 416. In *Herring v. N. Y., L. E. & W. R. R. Co.* 105 N. Y. 340, *supra*, the provision of the Code of Procedure in regard to the dissolution of

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corporations, and the powers and duties of receivers thereof, and the provisions of the Revised Statutes in regard thereto, are collated and discussed. It seems that the two systems of procedure against corporations, provided for in the Revised Statutes, one by an equitable action brought without leave of the court, and the other by a legal action brought with leave, have been continued under the Codes, and until the passage of the Code of Civil Procedure there was no statute regulating the powers and duties of receivers appointed in equitable actions. The power of the Supreme Court to appoint a receiver of an insolvent corporation is limited to the cases prescribed by the statute. *Lehigh Coal Co. v. Central R. R. of N. J.* 43 Hun, 546.

The emphatic language of the court in *Matter of Binghamton General Electric Co.* 143 N. Y. 261, is: "It has long been the settled law of the State that the jurisdiction of chancery does not extend to the sequestration of property of a corporation by a receiver," citing *United States Trust Co. v. N. Y., W. S. & B. R. R. Co.* 101 N. Y. 478; see Code, § 1810.

The power to appoint a receiver of rents and profits was, however, inherent in the Court of Chancery in actions for foreclosure. *Hollenbeck v. Donnell*, 94 N. Y. 342, and is not affected by the character of the mortgagor whether an individual or a corporation. *United States Trust Co. v. N. Y., W. S. & B. R. R. Co.* 101 N. Y. 478. It is held in *Murray v. Vanderbilt*, 39 Barb. 140, that a court of equity has power to appoint a receiver of a foreign corporation having property in its jurisdiction independent of statutory provisions.

No mere creditor of a corporation can have a receiver appointed until he has had judgment and execution returned when satisfied. *People v. Erie R. R. Co.* 36 How. 129. The Supreme Court has no power to appoint a receiver of the property of any corporation, whether domestic or foreign, upon the filing of a bill by a creditor at large on behalf of himself, and all others similarly situated. *Lehigh Coal, etc. Co. v. Central R. R. of N. J.* 43 Hun, 546. A plaintiff who is a corporator cannot have a receiver of the corporation appointed in an action against private individuals to which the corporation is not a party. *Groesbeck v. Dunscomb*, 41 How. 302. Where insolvency is not charged, nor a dissolution of a corporation asked, a receiver cannot be appointed, the effect of which would be to remove all the directors. *Belmont v. Erie*

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R. R. Co. 52 Barb. 637. A receiver cannot be appointed on petition in the action in which judgment was obtained against a corporation, but only in an action brought for the purpose. *Clinch v. Southside R. R. Co.* 1 Hun, 636. A receiver ought not to be appointed except in case of necessity to protect the stockholders or creditors from loss, or to prevent abuse of the corporate franchises, inasmuch as he displaces the directors or other trustees selected by the stockholders, and under the direction of the court has the control of its property and effects and, when authorized so to do, the exclusive power to use its franchises. *City of Rochester v. Bronson*, 41 How. 78. Where plaintiffs do not show themselves entitled to have a dissolution of the corporation, a receiver will not be appointed. *Denike v. N. Y. & Rosendale Lime, etc., Co.* 80 N. Y. 599.

When a receiver has been appointed, the order cannot be vacated by consent. *People v. Globe Mut. Ins. Co.* 60 How. 82. In an action for the appointment of a receiver, the corporation is a necessary party. *Mickles v. Rochester City Bank*, 11 Paige, 118. A receiver will not be appointed until the creditor has exhausted his remedy at law, and an execution must be returned unsatisfied in whole or in part. *Dambman v. Empire Mill*, 12 Barb. 341; *Galway v. United States, etc. Sugar Co.* 13 Abb. 211. Where a corporation transferred its property and assets to a new corporation, upon the sole consideration of shares of stock in the new company, a receiver was appointed in an action brought by a creditor on his judgment. *Barclay v. Quick Silver Mining Co.* 6 Lans. 25. For appointment of receiver of foreign corporation, see *Murray v. Vanderbilt*, 39 Barb. 140; *O'Brien v. Chicago, etc. R. R. Co.* 53 Barb. 568; *Debemer v. Drew*, 57 Barb. 438; § 1812, Code of Civ. Pro.; *Redmond v. Hoge*, 3 Hun, 171; *Hamilton v. Accessory Transit Co.* 26 Barb. 46.

It was held in *Attorney-General v. Bank of Columbia*, 1 Paige Ch. 511, that pending an appeal where the principle upon which the appointment of a receiver was pending was in question, the court would not appoint a receiver, there being no danger apprehended to the fund. A receiver will not be appointed for a manufacturing company at the suit of a general creditor or a dissolution of the company and the distribution of its funds on the ground of its insolvency. *Galway v. U. S. Steam Sugar Refining Co.* 36 Barb. 256, 21 How. Pr. 313, 13 Abb. 211.

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A court of original jurisdiction has not power before judgment in an action in which a receiver *pendente lite* has been appointed, on the application of the plaintiff, to make an order continuing the receivership after judgment shall have been rendered, during the pendency of any appeal which may be taken therefrom. It seems a court may appoint a receiver after judgment and pending an appeal though the judgment denies relief to the plaintiff, but the Code contemplates such application will be made upon the whole case including the adverse judgment and does not permit the order to be made in anticipation of the judgment. *Cokwell v. Garfield Nat. Bank*, 119 N. Y. 408.

Where in an action brought to prevent funds of a foreign corporation from being taken away from the State to the detriment of the resident members, the court has jurisdiction of the subject matter, and the facts show the necessity for the appointment of a temporary receiver, it has jurisdiction to appoint such a receiver *ex parte*, and its right to do so is not dependent upon the court acquiring jurisdiction over the person of the defendant. *Glines v. Supreme Order of Iron Hall*, 22 Civ. Pro. 437, 20 Supp. 275, affirmed, 50 St. Rep. 281.

No mere creditor of a corporation can have a receiver appointed until he has had judgment and execution returned unsatisfied. *People v. Erie Railway Co.* 36 How. 129. A plaintiff, who is a corporator, cannot have a receiver of the corporation appointed in an action against private individuals to which the corporation is not a party. *Groesbeeck v. Dunscomb*, 41 How. 302. Where insolvency is not charged, nor a dissolution of a corporation asked, a receiver cannot be appointed, the effect of which would be to remove all the directors. *Belmont v. Erie Railway Co.* 52 Barb. 637. A receiver cannot be appointed on petition in the action in which judgment was obtained against a corporation, but only in an action brought for the purpose. *Clinch v. Southside R. R. Co.* 1 Hun, 636. On the application of a stockholder a receiver may be appointed of an insolvent iron furnace company. *Osgood v. Maguire*, 61 N. Y. 524. Under § 1810 the Supreme Court has power to entertain an action brought by a stockholder of a corporation organized under the laws of New Jersey, for the appointment of a receiver of its property in this State, on the ground that it was insolvent, and a receiver of its effects had been appointed in that State, to appoint a receiver therein. *Worrichoffer v. North River Cons. Co.* 6 Civ. Pro. R. 113.

Art. 2. Jurisdiction to Appoint Receiver under the Decisions, etc.

SUB. 2. WHEN COURT WILL APPOINT RECEIVER.

The appointment of a receiver in a case provided for by law rests in the sound discretion of the court. *Verplanck v. Caines*, 1 Johns. Ch. 57. And a receiver will not be denied if the condition of the subject of the controversy requires the aid of such a remedy. *Rogers v. Marshall*, 38 How. Pr. 33, 6 Abb. Pr. (N. S.) 457.

If a majority of the stockholders of a corporation neglect to choose officers to take charge of the property, it was held in *Lawrence v. Greenwich Fire Ins. Co.* 1 Paige, 587, that a receiver will be appointed. Where the trustees of a dissolved corporation permit the trust to lie dormant for years, a receiver may be appointed on the application of the creditor, *ex parte*. *Matter of Pontius*, 26 Hun, 233. Where a judgment has been rendered sustaining the right of the plaintiff to a share of the stock and franchises of a corporation under an agreement of the parties providing for its incorporation, the court is authorized in the execution of such judgment to make an order appointing a receiver of the property of the corporation and appointing a referee under whose direction a corporate election of directors shall be held. *King v. Barnes*, 51 Hun, 550; s. c. 22 St. Rep. 47, 113 N. Y. 476, 23 St. Rep. 263.

On the application of a stockholder a receiver may be appointed for an insolvent fire insurance company. *Osgood v. McGuire*, 61 Barb. 54, affirmed, 61 N. Y. 524. If a corporation voluntarily appears in an action by the attorney-general for its dissolution, the court has jurisdiction to appoint a receiver. *Attorney-General v. The Guardian Mutual Life Ins. Co.* 77 N. Y. 272. A judgment having been recovered against a corporation and execution levied, a trustee of its bonds being insane, a receiver was appointed at the suit of the bondholder on notice to the creditors and the attorney-general. *Ettlinger v. Persian Rug and Carpet Co.* 66 Hun, 94, 49 St. Rep. 408, 20 Supp. 772.

A receiver appointed in an action against a corporation and certain of its directors for waste and to prevent alienation of its property should not be continued after judgment nor creditors restrained from enforcing their rights, where it appears that the offending directors have resigned and others have been elected in their place. *Halpin v. Mutual Brewing Co.* 91 Hun, 220, 36 N. Y. Supp. 151.

Art. 2. Jurisdiction to Appoint Receiver under the Decisions, etc.

In case of default on the part of a railroad company to apply interest, it is not material that its affairs are properly managed, the bondholders are entitled to a receiver. *Van Benthuyzen v. Central N. E. & W. R. R. Co* 45 St. Rep. 16, 17 Supp. 709. A court of equity will enforce a provision in a mortgage for the appointment of a receiver in case of default. *Keogh Mfg. Co. v. Whiston*, 26 Abb. N. C. 358, 14 N. Y. Supp. 344.

A receiver ought not to be appointed except in case of necessity, to protect the stockholders or creditors from loss, or to prevent abuse of the corporate franchises, inasmuch as he displaces the directors or other trustees selected by the stockholders, and under the direction of the court has the control of its property and effects and, when authorized so to do, the exclusive power to use its franchises. *City of Rochester v. Bronson*, 41 How. 78. Where a judgment-creditor applied for appointment of a receiver of a corporation which set up that the judgment was obtained by fraud and collusion, and time was given to enable defendant to move to open the judgment, and it failed to do so, *held*, the court was authorized to infer the defence was without merit. *Loder v. N. Y., Utica & O. R. R. Co.* 4 Hun, 222. Where the president of a railroad acted substantially as contractor and chief engineer, and as such made certificates for work done in excess of amount due, which he paid as president, *held*, a case for a receiver. *People v. Bruff*, 9 Abb. N. C. 153. Where plaintiffs do not show themselves entitled to have a dissolution of the corporation, a receiver will not be appointed. *Denike v. N. Y. & Rosendale Lime, etc. Co.* 80 N. Y. 599. When a receiver has been appointed the order cannot be vacated by consent. *People v. Globe Mut. Ins. Co.* 60 How. 82. In an action for the appointment of a receiver the corporation is a necessary party. *Mickles v. Rochester City Bank*, 11 Paige, 118. A receiver will not be appointed until the creditor has exhausted his remedy at law, and an execution must be returned unsatisfied in whole or in part. *Dambman v. Empire Mill*, 12 Barb. 341; *Galway v. United States, etc. Sugar Co.* 13 Abb. 211. Where a corporation transferred its property and assets to a new corporation, upon the sole consideration of shares of stock in the new company, a receiver was appointed in an action brought by a creditor on his judgment. *Barchay v. Quicksilver Mining Co.* 6 Lans. 25. For appointment of receiver of foreign corporation, see *Murray v. Vanderbilt*, 39 Barb. 140:

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O'Brien v. Chicago, etc. R. R. Co. 53 Barb. 568; *Debemer v. Drew*, 57 Barb. 438; § 1812, Code of Civ. Pro.; *Redmond v. Hoge*, 3 Hun, 171; *Hamilton v. Accessory Transit Co.* 26 Barb. 46. A receiver will not be appointed upon affidavits on information and belief. *Livingston v. Bank of N. Y.* 26 Barb. 304; *Bank of Columbia v. Attorney-General*, 1 Paige, 511. In *People v. Albany & S. R. R.* 7 Abb. (N. S.) 290, an application for a receiver was denied on ground that moving papers did not show defendants were irresponsible or about to perform the act sought to be restrained. The Legislature has the right to substitute a receiver for the directors to wind up the affairs of a company dissolved by it. Chapter 310, Laws 1886; *People v. O'Brien*, 45 Hun, 519.

Upon a motion for the appointment of a receiver of the corporation, allegations made by the creditor applying, though on information and belief, are to be taken as true where the facts peculiarly within defendant's knowledge are not denied. *Holland Trust Co. v. Consolidated Gas and Electric Light Co.* 85 Hun, 454, 66 St. Rep. 291, 32 Supp. 830. A corporation, like an individual, is insolvent when it is not able to pay its accruing debts. Insolvency means a general inability to answer in a course of business the liabilities existing capable of being enforced. *Brouwer v. Harbeck*, 9 N. Y. 594. An application for the appointment of a receiver of a corporation on the ground of insolvency is addressed to the sound discretion of the court, regulated by legal principles. *Denike v. New York and Rosendale Co.* 80 N. Y. 599.

The considerations which should guide the discretion of the court are the public interests, those of the stockholders and creditors, and a receiver will be appointed or the officers of the corporation retained as these interests seem most likely to be best subserved. *City of Rochester v. Bronson*, 41 How. 78. Where property has ceased to be an adequate security for the amount unpaid on mortgage, and the person liable for the debt is insolvent, a proper case is presented for the appointment of a receiver of the rents and profits of the property. *Burlingame v. Parce*, 12 Hun, 144; *Hollenbeck v. Donnell*, 94 N. Y. 342. It is held in *Quincy v. Cheeseman*, 4 Sandf. Ch. 465; *Bank of Ogdensburg v. Arnold*, 5 Paige, 38, that this rule is limited to a case where the whole amount of the mortgage is due.

Art. 3. Appointment and Qualification of Receiver.

ARTICLE III.

APPOINTMENT AND QUALIFICATION OF RECEIVER. RULE 80.

SUB. 1. PROCEEDINGS TO OBTAIN APPOINTMENT. RULE 80.

2. WHO MAY BE APPOINTED.

3. BOND OF RECEIVER.

SUB. 1. PROCEEDINGS TO OBTAIN APPOINTMENT. RULE 80.

Rule 80. Sequestration of property; receiver, motion for; where made; effect of, on subsequent suits; removal of.

All motions for the sequestration of the property of corporations, or for the appointment of receivers thereof, must be made in the judicial district in which the principal place of business of said corporations, respectively, is situated, except that in actions brought by the attorney-general in behalf of the people of this State, when it shall be made to appear that such sequestration is a necessary incident to the action, and that no receiver has already been appointed, a motion for the appointment of one may be made in any county within the judicial district in which such action is triable. No motion can be made, or other proceeding had for the removal of a receiver, elsewhere than in the judicial district in which the order for his appointment was made. And where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property in which a receiver is necessary.

Laws of 1883, chapter 378, relating to the appointment of receivers and proceedings in the cause, as amended:

§ 1. Every application hereafter made for the appointment of a receiver of a corporation, other than applications made by the attorney-general on behalf of the people of the State, shall be made at a special term of the supreme court, held in and for the judicial district in which the principal business office of the corporation is located; and all such applications made by the attorney-general shall be made in the judicial district in which the action in which the appointment is sought is triable; and any action or proceeding hereafter brought by the attorney-general on behalf of the people of the State against any corporation for the purpose of procuring its dissolution, the appointment of a receiver, or the sequestration of its property, may be brought in any county of the State, to be designated by the attorney-general. [Am'd, L. 1896, chap. 282.]

§ 8. A copy of motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court in every action or proceeding now pending for the dissolution of a corporation, or a distribution of its assets, or which shall hereafter be commenced for such purposes, shall, in all cases, be served on the attorney-general in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications, but for this law, would be *ex parte* or upon notice, and no order or judgment granted shall vary in any material respect from the relief specified in such copy or order, unless the attorney-general shall appear on the return day and have been heard in relation thereto; and any order or judgment granted in any action or pro-

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ceeding aforesaid, without such service of such papers upon the attorney-general, shall be void, and no receiver of any corporation shall pay to any person any money directed to be paid by any order or judgment made in any such action or proceeding, until the expiration of eight days after a certified copy of such order or judgment shall have been served as aforesaid upon the attorney-general.

§ 9. All applications to the court, contemplated by this act, shall be made in the judicial district where the principal office of the corporation against which proceedings are taken is located, excepting such applications as are made in actions brought by the attorney-general on behalf of the people of the State, and all such applications shall be made in the judicial district in which the action is triable. (Am'd L. 1896, chap. 282.)

§ 10. All actions or other legal proceedings and appeals therefrom or therein brought by or against a receiver of any of the insolvent corporations referred to in this act shall have a preference upon the calendars of all courts next in order to actions or proceedings brought by the people of the State of New York.

A receiver of a corporation may be appointed in the county in which the action is brought, notwithstanding rule 80, which cannot have the effect to prevent a party from suing in the county where he resides. *Smith v. Danzig*, 3 Civ. Pro. R. 127. Section 769 of the Code, which provides where motions may be made, is modified, and so far as it applies to motions for the appointment of a receiver of an insolvent corporation is concerned, superseded by § 1, chapter 378, Laws of 1883, which provides where such motions must be made. *United States Trust Company v. N. Y., W. S. & B. R. R. Co.* 6 Civ. Pro. R. 90. Same rule is held under same title, 35 Hun, 341, 101 N. Y. 478. See this act, however, as amended 1896, chapter 282, as given above. Where a matter is to be brought before the court, upon a regular notice of eight days, a notice of the motion, with a copy of the proposed order, must be served upon the attorney-general. Where it is to be brought before the court by an order to show cause, a copy of the order to show cause, and of the proposed order, should be served upon him. It is not necessary to serve upon him notice of the application for the order requiring cause to be shown. *Grcasen v. Goodwillie Wyman Co.* 38 Hun, 138. An action brought to sequester the property of a corporation is within the statute requiring notice to be given the attorney-general, and where the requirements of § 8 were not complied with, either in proceedings for the temporary appointment of a receiver, or in the final judgment, both appointments were held void. The service of the papers, as required by that section, is essential to the jurisdiction of the court, and a failure to make such service cannot properly

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be corrected without an entirely new proceeding. *Whitney v. N. Y. & Atlantic R. R. Co.* 32 Hun, 164. In *Munson v. Manhattan Co.* where notice had not been given to the attorney-general, upon due notice being given him, and an order entered appointing such receiver *nunc pro tunc*, such order was held at least valid from the time it was made. Where a court, in one judicial district, has power to remove a receiver appointed in an action in another, it has no power to make a new appointment. *Attrill v. Rockaway Improvement Co.* 25 Hun, 376, 509. A general judgment creditor is not entitled to notice of application for the appointment of a receiver of a corporation. *Morrison v. Menhadden Co.* 37 Hun, 522.

In *Olmstead v. Rochester & Pittsburg R. R. Co.* 8 St. Rep. 856, it was held that the principal business office of the company is at the place specified in its articles and its by-laws and reports, where all its books of transfer, stock books and accounts of receipts and disbursements are kept and the election of directors held. Case reported under this title, 35 Hun, and 101 N. Y., holds that this ruling as to place where application for receiver shall be made, does not apply to an application for the appointment of a receiver of the mortgaged property pending an action to foreclose a mortgage upon a railway, and an application for such receivership may still be made in the district in which the venue was laid.

It was held before the statute of 1883 that, as a general rule, the appointment would not be made on an *ex parte* application. *Davoe v. Ithaca, etc. R. R. Co.* 5 Paige, 521; *People v. A. & S. R. R. Co.* 7 Abb. (N. S.) 265; *Palmer v. Clark*, 4 Abb. N. C. 25; *Loder v. N. Y., Utica, etc. R. R. Co.* 4 Hun, 22.

Service of motion papers, etc., upon the attorney-general, in a judgment creditor's suit for sequestration, is jurisdictional, and the omission to do so renders the appointment of a receiver therein void. *Whitney v. N. Y. and Atlantic R. R. Co.* 32 Hun, 164. But notice of an ancillary receiver of the property of a foreign corporation, situate in this State, is not required. *Worishoffer v. North R. C. Co.* 6 Civ. Pro. R. 113.

Where a special proceeding is taken to determine the question as to the validity of claims against a corporation which has been dissolved and whose assets are in the hands of a receiver, it is not necessary that a copy of the motion papers should be served upon

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the attorney-general under the provisions of § 8, chapter 378, Laws of 1883, since such a proceeding merely determines the controversy between the receiver and the claimant, and is not one for the distribution of the assets of the corporation. *People v. American Steam Boiler Ins. Co.* 3 App. Div. 504.

Section 3 of chapter 378, Laws 1883, is as follows:

All orders appointing receivers of corporations shall designate therein one or more places of deposit wherein all funds of the corporation, not needed for immediate disbursement, shall be deposited, and no deposits or investments of such trust funds shall be made elsewhere except upon the order of the court, upon due notice given to the attorney-general.

Notice of Motion for Appointment of Temporary Receiver.
 SUPREME COURT.

 THE KINGSTON NATIONAL BANK

agst.

 THE JAMES CEMENT COMPANY.

Take notice that upon the verified complaint herein, a copy of which is herewith served upon you, this court will be moved at the next Special Term thereof, to be held at the City Hall in the city of Albany, on the 25th day of January, 1887, at the opening of the court, or as soon thereafter as counsel can be heard, that a temporary receiver may be appointed herein, pending this action, of the property and effects of the defendant, or for such further order or relief as the court may grant in the premises.

Dated January 15, 1887.

Yours, etc.,

R. BERNARD,

Attorney for Plaintiff.

To above defendant and Hon. Denis O'Brien, Attorney-General,
 State of New York.

**Order Appointing Temporary Receiver and Fixing Penalty of
 Bond in Action for Sequestration.**

(Caption.)

 THE KINGSTON NATIONAL BANK

agst.

 THE JAMES CEMENT COMPANY.

On reading and filing the complaint herein, duly verified January 15, 1887, and the notice of motion herein, with proof of the service

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of said complaint and said notice of motion on the defendant herein, and on Denis O'Brien, attorney-general of the State of New York: Now, on motion of R. Bernard, the attorney for the above plaintiff, no one appearing in opposition thereto, it is ordered that Amasa Humphrey, of the city of Kingston, be and he hereby is appointed receiver of the defendant, the James Cement Company, its stock, bonds, property, franchises, contracts, things in action and effects of every kind and nature, with the usual powers and duties according to the laws of this State, and the practice of this court, upon his executing and acknowledging, in the usual form, and filing with the clerk of this court, for the county of Ulster, a bond to the people of the State of New York in the penal sum of \$15,000, with at least two sufficient sureties, freeholders or householders of the State of New York, who shall severally justify, conditioned for the faithful discharge of their duties and for all moneys or property of every kind received by him as such receiver, which bond is to be approved as to its sufficiency, form and manner of execution by a justice of this court.

Second. That, upon filing said bond so approved, said receiver proceed forthwith to collect and receive the debts, demands and other property of said corporation, and to preserve the property and the proceeds of the debts and demands collected, to sell or otherwise dispose of the property, or to do any other act or thing in regard to said property, or in his office as receiver, as hereinafter directed by this court, to collect, receive and preserve the proceeds, and to maintain any action or special proceeding for either of those purposes.

Third. That the principal value of the property of said defendant consists of its cement quarries and mills and kilns, and of the property used in connection therewith, and that said property is of greater value when kept and used together than when separated, and that said property shall not be sold or disposed of by said receiver so as to impair the convenient and practical use of said mills, kilns or quarries without the order of this court; that the real estate of said defendant shall not, nor shall any part thereof, be sold by said receiver without a like order, and that said receiver shall, until otherwise ordered by this court, use and manage said property with a view to the continuance of said business of said defendant.

Fourth. That the defendant, its directors, officers, agents and servants, and all persons whomsoever, having notice of this order, be and they hereby are enjoined from in any manner interfering with said receiver in the discharge of his duties as such, and from collecting any of its debts or demands, and from paying out, disposing of, or in any way transferring or delivering to any person any of the money, property or effects of the said defendant, except to deliver the same to the said receiver.

Fifth. That the said receiver shall deposit all funds of the defendant, coming in his hands not needed for immediate disbursement, in the Kingston National Bank of Kingston, New York.

C. R. INGALLS,

Justice Supreme Court.

Art. 3. Appointment and Qualification of Receiver.

Precedent for Order Appointing Receiver with Temporary Injunction.

At a Special Term of the Supreme Court, held at the County Court House in the city of Brooklyn, on the 26th day of June, 1893.

Present — Hon. Calvin E. Pratt, *Justice*.

Paul Halpin

agst.

The Mutual Brewing Company, Matthew Coleman, Thomas D. Coleman, Patrick Coleman, Michael T. Coleman, The Coleman Brewing Company, Frederick Eder, Edward Joyce, John N. Hayward, Christian F. Tietjen, Trustee of John N. Hayward, T. D. Coleman & Brother, Dennis Coleman, Louis F. Duesing and George S. Mitchell.

148 N. Y. 744.

On reading and filing the summons and complaint in this action, the affidavits of Maurice J. Power (recite names of other persons making affidavits) and the order to show cause why an injunction should not issue, and a receiver be appointed, and the consent of the Albany City National Bank, the owners of 500 shares of the capital stock of the Mutual Brewing Company, and of the plaintiff, Paul Halpin and Edward Duffy, owners of 250 shares of the capital stock of the Mutual Brewing Company, and the affidavits of Frederick Eder, in opposition thereto, and after hearing Peter A. Hendrick, Esq., on the part of the plaintiff, in support of the motion (recite other appearances), and it appearing that the defendant the Mutual Brewing Company is insolvent, and that it is necessary for the protection of its property and the rights of its creditors and stockholders that a receiver be appointed, and that its creditors should be enjoined from bringing any actions against it, and it appearing that the summons and complaint, affidavits and order to show cause, were served upon the defendants, The Mutual Brewing Company, Frederick Eder, Louis W. Duesing, John N. Hayward and Christian F. Tietjen, trustee, etc., and upon the attorney-general of the State of New York,

Now, on motion of Durnin & Hendrick, attorneys for the plaintiff, it is,

Ordered, that Edward Duffy, Esq., be and he is hereby appointed receiver of the property and assets of the defendant, The Mutual Brewing Company, its stocks, bonds and property, both real and personal, contracts, things in action and effects of every kind and nature, with the usual powers and duties of receivers, as provided by the Code of Civil Procedure and in the practice of this court, and the said receiver be and he is hereby authorized to conduct and carry on the business of The Mutual Brewing Company and to em-

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ploy and discharge help and purchase materials to carry on the business, and incur liability therefor, and it is

Further ordered, that said receiver, before entering upon the discharge of his duties as herein provided, execute and file with the clerk of the county of Queens a bond to the people of New York, in the penal sum of \$10,000, with two sufficient sureties to be approved by this court. And it is

Further ordered, that the receiver deposit with The People's Trust Company of Brooklyn, N. Y., any sum of money in his hands in excess of \$10,000 which is to be kept by him for immediate disbursements in the conduct of his trust. It is

Further ordered, that the president, officers, agents and servants of the defendant, The Mutual Brewing Company, be and each of them is hereby enjoined and restrained from interfering with the property and assets of the defendant, The Mutual Brewing Company, or the conduct of its business, and the said president, officers, agents and servants of the defendant, The Mutual Brewing Company, be and they are each hereby directed to transfer and turn over to said receiver all books of account, property and assets of the defendant, The Mutual Brewing Company, of every kind and nature now in their hands or under their control. It is

Further ordered, that the creditors of the said corporation and all persons whosoever, having notice of this order be and they are hereby enjoined from bringing any action against the said defendant, The Mutual Brewing Company, for the recovery of any sum of money or from taking any further proceeding in such an action heretofore commenced, or any further proceedings on any judgment recovered against said defendant, The Mutual Brewing Company, or any execution issued thereon. It is

Further ordered, that said receiver is authorized to conduct and carry on the business of said defendant, The Mutual Brewing Company, as herein provided, until the further order of this court, and that the said receiver be and he is hereby authorized to apply to the court for any further instructions at any time as he may deem proper. It is

Further ordered that the injunction heretofore granted restraining the sheriff of the county of Queens from proceeding under the executions issued to him against the defendant, The Mutual Brewing Company, be and the same is hereby continued until the further order of this court; it is

Further ordered, that Christian F. Tietjen, trustee of John N. Hayward and T. D. Coleman & Brothers, be and he is hereby restrained from foreclosing the chattel mortgage made to him as such trustee, by the defendant, The Mutual Brewing Company.

Order granted June 26th, 1893.

JOHN COTTIER,
Clerk.

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SUB. 2. WHO MAY BE APPOINTED.

Section 66, Article III, title IV, chapter 8, Part 3, 9th ed. Revised Statutes, *supra*, is as follows:

Any of the directors, trustees or other officers of such corporation, or any of its stockholders, may be appointed receivers, who, before entering upon the duties of their appointment, shall give such security to the people of this state, and in such penalty, as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all moneys received by them.

§ 90. [Added, 1877; am'd, 1896.] **Clerk in New York, or Kings, not to be referee, receiver, etc.**

No person holding the office of clerk, deputy-clerk, special deputy-clerk, or assistant in the clerk's office, of a court of record or a surrogate's court, nor any person holding a salaried office under the city or county government, or who receives money by virtue of an office which is a county charge, within either the counties of New York or Kings, shall hereafter be appointed, by any court or judge, a referee, receiver or commissioner, except by the written consent of all the parties to the action or special proceeding, other than parties in default for failure to appear or to plead.

A general agent of a corporation was held properly appointed receiver to close up a business against the opposition of one of the parties, he being the person specified in the agreement as the one who should close up the affairs unless objected to by both parties. *Hanover Fire Ins. Co. v. Germania Fire Ins. Co.* 33 Hun, 539. In *Re Eagle Iron Works*, 8 Paige, 385, the court appointed the president and bookkeeper of the corporation receivers, it not appearing that they were responsible for the bankruptcy of the company. The principle that an officer of a corporation is not disqualified to be appointed receiver, and that the request of the majority of the stockholders in a railroad foreclosure is entitled to great weight in the selection was applied in *United States Trust Co. v. N. Y. West Shore, etc. Co.* Abb. Ann. Dig. 1885, p. 296.

A clerk of the court cannot be appointed receiver under § 90 of the Code unless all parties consent, but such an appointment is an irregularity only and cannot be availed of collaterally. *Moore v. Taylor*, 40 Hun, 56. As to appointment of party enjoined, see *Eddy v. Co-operative Dress Ass'n*, 3 Civ. Pro. R. 434. A trust company has been appointed receiver of two banking institutions. *Matter of Knickerbocker Bank*, 19 Barb. 602. The secretary of an insolvent savings bank who had been used by directors shortly after appointment to verify a false statement of solvency, *held*, not a fit person to be appointed its receiver on

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their nomination. *People v. Third Ave. Savings Bank*, 50 How. 22. The appointment of a trustee of an insolvent corporation as receiver will be set aside when it appears to have been made in a collusive action. *Wilson v. Barney*, 5 Hun, 257.

By chapter 425, Laws 1885, trust companies may be appointed receivers by the court without giving security. By § 2429 of the Code, on voluntary dissolution of a corporation one of its officers may be appointed receiver.

The rule is that private preferences must yield to public considerations, and that all parties have a right to rely upon the unbiased judgment of the court in making such an appointment. *Matter of Empire City Bank*, 10 How. 498. A trustee whose business it is to watch the receiver, was held not a proper person to be appointed under the old chancery practice. *Bank of Monroe v. Schermehorn*, 1 Clarke's Ch. 166; and Chancellor Walworth, in *Attorney-General v. Bank of Columbia*, 1 Paige, 511, said: "Public policy requires that the directors shall understand distinctly that if they so manage the concerns of the institution as to produce insolvency, the property and effects of the institution will be taken from them entirely and will be placed in the hands of those who will investigate their conduct fearlessly and impartially." See *Keeler v. Brooklyn Elevated R. R. Co.* 9 Abb. N. C. 166.

SUB. 3. RECEIVER'S BOND AND LIABILITY THEREON.

Section 66, Article 3, title 4, chapter 8, Part 3, R. S., provides for security, as follows:

Any of the directors, trustees or other officers of such corporation, or any of its stockholders, may be appointed receivers who, before entering upon the duties of their appointment, shall give such security to the people of this state and in such penalty as the court shall direct, conditioned for the faithful discharge of the duties of their appointment and for the due accounting of all moneys received by them.

The extent of the liability of a surety can be determined only by the terms of the bond, and he will not be held bound by the adjudication against his principal unless it is so provided for by the terms of the bond. *Thompson v. MacGregor*, 81 N. Y. 592. No action can be maintained against the sureties on the bond of a deceased receiver until an accounting has been had to settle the liability of the receiver. *French v. Dauchy*, 57 Hun, 100. The remedy of a party having a claim as to funds or property in the

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hands of a receiver is to apply to a court on notice for relief. *People v. Bank of Dansville*, 39 Hun, 187; *People of State of N. Y. v. Nat. Trust Co.* 82 N. Y. 283.

Where a temporary receiver, appointed in an action to sequester the property of the corporation, has duly executed and filed the requisite bond, and thereafter, under the judgment in the action, is continued as permanent receiver, while a further bond may be executed in the discretion of the court, he is under no obligation to furnish it until required to do so, and his failure to do so does not affect his power to act as permanent receiver. *Jones v. Blum*, 145 N. Y. 333, 64 St. Rep. 806.

Bond of Receiver.

Know all men by these presents, That we, Amasa Humphrey, as principal, and James S. Winne, of the city of Kingston, Ulster county, N. Y., by occupation a hotel-keeper, and James F. Brower, of the city of Kingston, Ulster county, N. Y., by occupation a banker, and Jacob L. DeWitt, of said city, by occupation a merchant, as sureties, are held and firmly bound unto the people of the State of New York in the sum of \$15,000, to be paid to the said people; for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Scaled with our seals.

Dated the 25th day of January, 1887.

Whereas, At a Special Term of the Supreme Court, held at the City Hall, in the city of Albany, on the 25th day of January, 1887, in an action pending between the Kingston National Bank, plaintiff, and the James Cement Company, defendant, on application of the plaintiff, Amasa Humphrey was duly appointed temporary receiver of all the property, debts, equitable interests, rights and things in action, effects and estate, real and personal, of the said James Cement Company, pursuant to the provisions of the Code of Civil Procedure.

Now, therefore, the conditions of this obligation are such that if the said Amasa Humphrey shall faithfully discharge his duties as such receiver, and duly account for all moneys or property of every kind received by him as such receiver, then this obligation shall be void, otherwise to be in full force and effect.

AMASA HUMPHREY.	[L. S.]
JAMES F. BROWER.	[L. S.]
JAMES S. WINNE.	[L. S.]
JACOB L. DE WITT.	[L. S.]

Scaled and delivered in the presence of

V. B. VAN WAGONEN.

(Add acknowledgment, justification and approval.)

 Art. 4. Rights, Powers and Duties of Receiver.

ARTICLE W.

RIGHTS, POWERS AND DUTIES OF RECEIVER. RULE 81.

SUB. 1. TITLE OF RECEIVER TO PROPERTY.

2. POWERS, DUTIES AND LIABILITIES OF RECEIVER. RULE 81.

SUB. 1. TITLE OF RECEIVER TO PROPERTY.

Section 1, chapter 285, Laws of 1884, is as follows:

§ 1. All property, etc., to vest in receiver, except as to insurance companies.

In all cases where receivers have been or shall be appointed for any corporation of this state other than an insurance company, on application by the attorney-general, all property, real and personal, and all securities of every kind and nature belonging to such corporation, no matter where located or by whom held, shall be transferred to, vested in and held by such receiver; provided, however, that such transfer shall only be made when directed by an order of the supreme court, due notice of the application for such order having been made on the attorney-general and the custodian of the funds, securities or property.

§ 2. [Am'd, Laws 1896, chap. 322.] Transfer of security deposits to receiver; proceedings as to foreign companies.

In every case where life insurance or annuity companies or any corporation of the class provided for by article two of the insurance law, entitled "life, health and casualty insurance corporations," whether formed under said article or prior thereto, has been or hereafter may be dissolved, and a receiver thereof appointed, upon the application of the attorney-general, or by action begun in the name of the people of the state of New York, each and every security and fund which shall have been deposited by such company prior to its dissolution, with the superintendent of the insurance department, for the security and protection of its policy-holders or any class of such policy-holders, under the statutes in such cases made and provided, may, by an order of the supreme court, made at a special term thereof held within the judicial district in which the principal office of such company was located, prior to its dissolution, upon the application of the attorney-general, after service of eight days' written notice of such application upon the superintendent of the insurance department, be transferred from the said superintendent of the insurance department to the receiver of such company; and thereupon the said superintendent shall deliver such funds and securities to such receiver, and in him the title thereto shall immediately vest. Such receiver shall thereupon convert such securities and funds into money, and shall distribute the proceeds thereof, and of each and every class of such funds or securities, among the respective holders of valid policies of such company for whose benefit and security the deposit or deposits were originally made proportionately to the respective valuations of such policies, as shall be ascertained in proceedings taken by such receiver for the valuation of policies and the determination of the liabilities of such company under the statutes in such cases made and provided, and the course and practice of the supreme court in cases of insolvent corporations, until such valuation shall have been paid in full. If any portion of such proceeds shall then remain, such balance may, under an order of the supreme court in such behalf duly made at special term, be made a part

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of the general assets of such receivership, and thereupon be distributed by said receiver in payment of or upon the general liabilities of such dissolved company according to law. And in case of a corporation formed under the laws of any other state, doing insurance business in this state of the nature of that done by the corporation above mentioned, in case of any action or proceeding brought or hereafter to be brought in this state by the attorney-general, or in the name of the people of the state of New York, for the winding up of its business in this state, or for or in solving distribution of its assets therein, the same proceedings may be had with reference to any securities and funds deposited by such corporation with the superintendent of the insurance department of this state under the statutes in such case made and provided, as are hereinbefore provided with reference to deposits of corporations of this state, save only that the order for transfer of the deposit may be made in the judicial district in which the principal office of the corporation in this state was located at the commencement of the action or proceeding, or in the third judicial district.

The statute, § 67, title IV, etc., *supra*, vests all the estate, real and personal, of the corporation in the receiver, and § 68 gives him the power and authority conferred by law on trustees for the estate of an insolvent debtor. These provisions consist of §§ 1 to 62 of article 8, title I, chapter 5, part II of the Revised Statutes, 8th ed., page 2524, *supra*. The object of the statute is to take away the franchises of the corporation and its power of action immediately on a petition for a receiver being filed, if its prayer is granted. *Matter of Berry*, 26 Barb. 55.

A receiver, though he may be appointed in a suit brought by a simple creditor or stockholder, takes the whole estate for the benefit of all its creditors. *Rinn v. Astor Fire Ins. Co.* 59 N. Y. 143. A decree upon the application of the attorney-general dissolving the corporation, vests in the latter all the property of the corporation. The receiver represents both the corporation and the creditors and stockholders, and in his character as trustee for the latter he may disaffirm and maintain an action to set aside illegal or fraudulent transfers of the property of the corporation made by its officers or agents, or to recover its funds or securities invested if misapplied. *Matter of Attorney-General v. Guardian Mutual Life Ins. Co.* 77 N. Y. 272. Title may vest in a receiver without a conveyance. *Attorney-General v. Atlantic Mutual Life Ins. Co.* 34 Hun, 636. A judgment creditor cannot take property on execution from a receiver. *Chapman v. Douglas*, 5 Daly, 244. The receiver's title relates back to the time of the granting of the order of reference to appoint a receiver, and all transfers made after that time are void. *Matter of Berry*, 26

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Barb. 55. A tax can only be properly assessed against the corporation in the name of the receiver. *Matter of Mallory*, 18 St. Rep. 499. He has no title personally, but his possession is that of the court and as receiver he represents a separate and independent legal existence, and an order made in an action brought against him personally and not as receiver and not in any way purporting to affect him in his official character, has no force or bearing upon him as receiver. *Eddy v. Co-operative Dress Ass'n*, 3 Civ. Proc. R. 434.

An order appointing a receiver sequesters the property by operation of law and the title vests by relation as of the date of the order. *Matter of Eagle Iron Works*, 8 Paige, 385; *Deming v. N. Y. Marble Co.* 12 Abb. 66; *Lottimer v. Lord*, 4 E. D. Smith, 183; *Van Alstyne v. Cook*, 25 N. Y. 485; *Smith v. N. Y. Consolidated, etc. Co.* 18 Abb. 420. The order cannot, however, as against third persons, date or relate back beyond the time of granting it. *Van Alstyne v. Cook*, 25 N. Y. 489. No person has a right to interfere with the possession of the receiver, and if he does so he is in contempt of the authority of the court and punishable as such. *Matter of Woven Tape Skirt Co.* 12 Hun, 111; *Noe v. Gibson*, 7 Paige, 513. This is true even though the receiver declines to act as such. The property being in the custody of the court, persons having liens upon it have no right to interfere with its possession by the receiver without an adjudication by the court. If, however, the property is in the possession of the sheriff under a levy made under an execution and not in the possession of the receiver, and is sold by the sheriff without the permission of the court, such sale is not absolutely void, but at most can be held to be irregular. *Varnum v. Hart*, 119 N. Y. 101. On appointment of a receiver in a proceeding to dissolve a corporation, the property becomes vested in him and a State court may enjoin creditors from proceeding against such property. *Matter of Schuyler Steam Towing Boat Co.* 64 Hun, 384, 43 St. Rep. 163, 18 Supp. 87, affirmed without opinion, 19 Supp. 565.

By the proper presentation to a State court, after due notice of the application, of a petition praying for the dissolution of a corporation and upon the appointment of a receiver, the court acquires jurisdiction of the subject-matter, and although the receiver has not actually taken the property of the corporation into his manual possession, the jurisdiction of the court over it is

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exclusive. The appointment of the receiver is completed by the filing and entering of the order appointing him, although he may be directed to execute and file a proper bond before he proceeds to discharge his duty; when that is done he can take actual manual possession of the property and his title relates back to the date of appointment. No other court, therefore, either Federal or State, can obtain jurisdiction over the property after the filing and entry of the order, even under process upon which possession was taken prior to the filing of the bond. *Matter of Schuyler Steam Tow Boat Co.* 136 N. Y. 169.

A temporary receiver is an officer and representative of the court and is at all times entitled to its advice and direction. *People v. St. Nicholas Bank*, 76 Hun, 525, 58 St. Rep. 843, 28 Supp. 114. A temporary receiver in sequestration proceedings has power to examine a person alleged to have possession of property that he should take possession of. *Rich v. Sargent*, 61 St. Rep. 852, 30 Supp. 139, 23 Civ. Pro. R. 359.

It is not a general rule that a receiver can only take title for an insolvent person or corporation by a formal conveyance. The general rule is otherwise as in the case of receivers of insolvent corporations. The title of receivers in such cases to real and personal property, both in this country and in England, is generally statutory and not under any formal conveyance. *Matter of Attorney-General v. Atlantic Mut. Life Ins. Co.* 100 N. Y. 279.

A receiver on voluntary dissolution of a corporation takes title to the assets upon the order of appointment, and no superior lien can be required by the levy of an attachment between the making of the order and the time the receiver takes possession. *Dickey v. Bates*, 13 Misc. 489, 35 Supp. 525. The title of a receiver of a corporation to its assets does not relate back so as to divest the lien of an execution levied between his appointment and qualification where the corporation had no defence to the action, but delayed recovery of judgment by the interposition of a frivolous answer. *Matter of Lewis v. Fowler Mfg. Co.* 89 Hun, 208, 34 Supp. 983, 69 St. Rep. 44.

The general rule is that after property has once passed into the possession of a receiver, no lien can be acquired thereon or action taken with reference thereto without leave of the court. *Attorney-General v. Continental Life Ins. Co.* 28 Hun, 360, affirmed, 93 N. Y. 630.

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SUB. 2. POWERS, DUTIES AND LIABILITIES OF RECEIVER. RULE 81.

The receiver has such an interest in the property as is sufficient to enable him to prosecute an action to set aside a mortgage executed by the corporation without the assent of the stockholders. *Vail v. Hamilton*, 85 N. Y. 453. Or to avoid a chattel mortgage upon the property of the corporation. *Rudd v. Robinson*, 54 Hun, 339. In such case the receiver represents not only the creditor in whose suit he has been appointed, but the other creditors of the corporation, and is empowered to maintain an action to set aside a mortgage by chapter 314 of the Laws of 1858. He may bring an action to determine what bonds which have been issued by a company are secured by a mortgage issued by it, and what bonds should be excluded from sharing in the proceeds arising from the foreclosure of the mortgage. *Herring v. N. Y. L. E. & W. R. R. Co.* 105 N. Y. 340. And he may maintain an action to determine the validity of bonds and to what extent a mortgage is a valid and subsisting lien upon the property of the corporation. *Hubbell v. Syracuse Iron Works*, 42 Hun, 182, 4 St. Rep. 690. A receiver may disaffirm the validity of acts of a corporation void in themselves where such acts are forbidden and unauthorized by law. *Hoyt v. Thompson*, 5 N. Y. 320; *Leavitt, Receiver, v. Yates*, 4 Edw. Ch. 134. A receiver of an insolvent corporation suing for the benefit of its creditors, on a cause of action which the corporation itself could not have sued upon, to recover back payments made by the corporation in fraud of the creditors, represents rather creditors than the corporation, and a claim against the corporation cannot be offset against a claim due to the representative of the creditors. *Osgood v. Ogden*, 3 Abb. Ct. of App. Dec. 425.

A receiver may sometimes assert the rights of creditors which he might be unable to assert as representative of a corporation upon the principle which permits a receiver of an insolvent corporation in the interest of creditors to disaffirm dealings of the debtor in fraud of their rights. *Pittsburg Carbon Co. v. McMillan*, 119 N. Y. 46, 24 Abb. N. C. 96, 28 St. Rep. 807, affirming 24 St. Rep. 848, 53 Hun, 67, 23 Abb. N. C. 298, 6 Supp. 433.

A receiver may take advantage of any fraud in derogation of the rights of creditors and any transaction prohibited by law, to which the corporation was a party. *Nathan v. Whitlock*, 9 Paige,

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152; *Atkinson v. Rochester Printing Co.* 114 N. Y. 168; *Osgood v. Laytin*, 3 Abb. Ct. of App. Dec. 418. He has also the right of action against the stockholders of the company to recover the amount of their unpaid subscriptions to its capital stock. *Dayton v. Borst*, 31 N. Y. 435; *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Whittlesey v. Frantz*, 74 N. Y. 456; *Pentz v. Hawley*, 1 Barb Ch. 122. He may prosecute the stockholders separately if he sees fit. *Van Wagomen v. Clark*, 22 Hun, 497. He may maintain an action to restrain judgment creditor from proceeding against a stockholder on account of his unpaid subscription. *Rankine v. Elliot*, 16 N. Y. 377. The receiver has the right of action against the directors of a corporation who misapplied its funds or suffered them to be wasted by gross neglect or inattention. *Brinkerhoff v. Bostwick*, 88 N. Y. 52. As to his right to assign a claim, see *Mann v. Fairchild*, 2 Keyes, 106. Receivers have power to compromise doubtful claims. *Matter of Croton Ins. Co.* 3 Barb. Ch. 642. It must be added, however, that this power should not be exercised except by direction of the court. He is authorized to collect rents and profits of real estate. *Wyckoff v. Scofield*, 98 N. Y. 475; *Lofsky v. Mauger*, 3 Sandf. Ch. 69. A temporary receiver of a bank has no power without an order of the court to surrender collaterals pledged as security for a loan to offset the amount of the debt against a deposit. A temporary receiver is an officer and representative of the court and is at all times entitled to and must receive the advice and protection of the court. His powers are limited by §§ 1788 and 1789, which expressly confer upon the court the duty of enlarging them from time to time as the exigencies of the situation may require. *People v. St. Nicholas Bank*, 76 Hun, 522, 58 St. Rep. 843, 28 Supp. 114.

The court may direct immediate payment or a reference or such other proceeding as may be necessary to determine the rights of parties at issue and to preserve the rights of all other parties in interest. *Matter of Ensign*, 95 N. Y. 664; *Cuykendall v. Corning*, 88 N. Y. 139, where a party may be allowed to bring an action; *Parker v. Browning*, 8 Paige, 388; *People v. Remington*, 19 Abb. N. C. 350; and the court has power to take proceedings in such an action. *Attorney-General v. North Amer. Life Ins. Co.* 6 Abb. N. C. 293. The court has power to extend the time to present claims against the assigned estate. The rule as

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to distribution of the assets of an insolvent corporation under the Revised Statutes is construed in *Rinn v. Astor Fire Ins. Co.* 59 N. Y. 143; *Matter of Harmony Fire & Marine Ins. Co.* 45 N. Y. 310; *Owen v. Kellogg*, 56 Hun, 455; *Smith v. Manhattan Ins. Co.* 4 Hun, 127. The court has power to vacate a sale made by a receiver in its discretion. *Hackley v. Draper*, 60 N. Y. 88; *Farmers' Loan and Trust Co. v. Bankers & Merchants' Tel. Co.* 119 N. Y. 15.

While the rule is that a devise that would have been good against the corporation may be asserted against the receiver, yet where there are innocent creditors the receiver may on their behalf maintain an action on illegal contract of the corporation although the latter is precluded from maintaining the same by reason of standing *in pari delicto*. *Pittsburgh Carbon Co. v. Mc-Millan*, 119 N. Y. 46; S. C. 24 Abb. N. C. 96, 28 St. Rep. 807, affirming 53 Hun, 67, 23 Abb. N. C. 298, 6 Supp. 433, 24 St. Rep. 848.

Section 1788, in regard to temporary receivers, requiring them to qualify as prescribed by law for the qualification of permanent receivers, applies only to those things which a receiver must do in order to qualify him to act as such receiver, and not to his proceedings after his qualification. *Ncalis v. American Tube and Iron Co.* 76 Hun, 220, 59 St. Rep. 120. A receiver will only be required to give security for costs where the action has been brought in bad faith or heedlessly or without reasonable prospect of success. *Hale v. Mason*, 86 Hun, 499, 33 Supp. 789, 67 St. Rep. 535; *Ridge-way v. Symons*, 14 Misc. 78, 35 Supp. 197, 25 Civ. Pro. R. 23, 69 St. Rep. 552.

A receiver of a railroad has no power without the order of the court to issue notes or certificates binding upon the trust estate, and the holder of them can make out an equitable claim thereon only by showing that the money received therefor was used for the benefit of the estate. *Wesson v. Chapman*, 77 Hun, 144, 59 St. Rep. 44, 28 Supp. 431.

A temporary receiver of a corporation has power to maintain any action or special proceeding for the purpose of collecting, receiving or preserving the property of the corporation. A proceeding by such receiver to examine a person alleged to have in his possession property to which the receiver is entitled, is a special proceeding for the purpose of collecting, receiving and pre-

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serving the property of the corporation and one which the receiver is entitled to maintain. *Rich v. Sargent Granite Co.* 23 Civ. Pro. R. 359, 61 St. Rep. 852, 30 Supp. 139.

A receiver, merely as such, may not disaffirm acts of the corporation whose assets he holds or its directors, if it does not appear that it was insolvent or has creditors to be protected or that those having an equitable interest in the property affected have repudiated the transaction. *Forker v. Brown*, 10 Misc. 161, 62 St. Rep. 480, 30 Supp. 827. An order directing a receiver to bring an action is properly denied where notice to the parties to be proceeded against has not been given. *People v. Life Union*, 84 Hun, 560, 65 St. Rep. 880, 32 Supp. 1148. Upon the appointment of a receiver of a corporation, the right to the possession of all the corporate property vests in him as well as the title to property which remained in the corporation, although it may have created a trust concerning it. *Matter of Home Provident Safety Fund Ass'n*, 39 St. Rep. 437, 15 Supp. 211. The receiver, as the representative of the corporation itself, possesses no greater rights than those which belong to the corporation. *Hyde v. Lynde*, 4 N. Y. 387. Where a receiver sought to have certain trust deeds given by a corporation at the time it was in embarrassed financial circumstances declared void, the receiver contended for their invalidity that they were made when insolvent or in contemplation of insolvency and with intent to give preference to particular creditors over other creditors, but it was held that such deeds were not void. *Curtiss v. Leavitt*, 15 N. Y. 9. So far as a receiver assumes obligations of contracts, acting within the authority of the order which creates the receivership, he will be held to the legal obligations of such contracts. *Woodruff v. Eric R. R. Co.* 93 N. Y. 609.

Any legal preference which creditors may obtain without fraud or collusion on the part of the corporation, cannot be attacked as invalid by a receiver subsequently appointed. *Varnum v. Hart*, 119 N. Y. 101. Where a receiver is not shown to represent any creditor having an equity, he stands simply in the position of the company. *Billings v. Robinson*, 94 N. Y. 417; *Cutting v. Damerel*, 88 N. Y. 410; *Savage v. Medbury*, 19 N. Y. 32. A receiver has no power to allow a set-off against a debt owing to the corporation of which he is receiver where the demand sought to be set off was assigned to the debtor for that purpose after his

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appointment, and what he cannot do directly cannot be done by way of ratification or waiver. *Van Dyck v. McQuade*, 85 N. Y. 616, affirming 20 Hun, 262.

The receiver of a life insurance company is unauthorized to take, for purposes of distribution, the securities in the hands of the superintendent of the insurance department belonging to said company, deposited with him for the protection of policyholders *Ruggles v. Chapman*, 64 N. Y. 557, since it is the duty of the superintendent to keep these securities, convert them into money and distribute the funds among the parties entitled. *Smyth v. Monroe*, 84 N. Y. 362; *Matter of Voluntary Dissolution of Home Prov. Safety Fund Ass'n*, 129 N. Y. 288; see 13 Hun, 115, affirmed, 74 N. Y. 617.

While a statute of another State, continuing dissolved insurance and other corporations for a certain period for the purpose of prosecuting suits by or against them, may render valid and effective a judgment obtained in such State against a corporation of this State after its dissolution here, so far as its property within such other State where it had been doing business is concerned, this State is not required by comity, and will not give to such foreign judgment the effect of reaching the corporate assets held by a receiver in this State as a fund for distribution after the dissolution of the corporation here, when the receiver has not been made a party to the foreign suit so as to be bound by the judgment therein. *Rodgers v. Adriatic F. Ins. Co.* 148 N. Y. 34.

The right of a creditor of an insolvent corporation in the hands of a receiver to have a preference over bondholders under a first mortgage is *strictissimi juris*; and such a creditor will not be entitled to such preference, or to call upon holders of receivers' certificates, who have been paid part of their claim, to contribute to make him equal with them, on the ground that, although not holding such certificates, his claim consists of a loan to the corporation of money used in paying debts of a character for which receivers' certificates were subsequently authorized to be issued, by a judgment which declared that such certificate should be a first lien on the mortgaged property. *Farmers' Loan & Trust Co. v. Bankers & Merchants' Tel. Co.* 148 N. Y. 315.

An application to authorize the receiver of an insolvent corporation, appointed in a proceeding for its dissolution, to pay, as a

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preferred claim, out of the fund in his hands, a reasonable allowance to counsel employed by the corporation, for services rendered in the defence of the proceeding, is properly denied, where it appears that, by reason of the actual insolvency of the corporation known to its officers, and of their attempt to continue it in business by fraudulent means, the employment of counsel to resist the proceeding was unjustifiable, although the counsel may have acted in good faith and stopped the defence on discovering that the corporation was insolvent. *People v. Commercial Alliance Life Ins. Co.* 148 N. Y. 563.

Every lien upon the property of a corporation resting upon valid agreement or process before the appointment of a receiver or lienor, being lawfully in possession, must be preserved with the right of enforcement unless courts and legislatures are to override the vested rights of creditors. This principle has been repeatedly recognized and approved in the Court of Appeals. *Matter of Binghamton General Electric Co.* 143 N. Y. 261.

A receiver of a corporation organized under the General Manufacturing Act is not vested with the right of action given by that act to creditors of the corporation against the stockholders thereof. The liability of the stockholder does not exist in favor of the corporation itself or for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions, and it is to be enforced by these in their own right and for their own especial benefit. *Farnsworth v. Wood*, 91 N. Y. 308, distinguishing *Story v. Furman*, 25 N. Y. 214.

Where, pending an action by a stockholder against the corporation and its directors for waste of its assets, in which a receiver was appointed, an election of directors was held and the directors charged with malfeasance are removed, the continuance of the receivership is unauthorized and unnecessary, and creditors who have obtained judgment against the corporation should be permitted to proceed with the collection thereof. *Duncan v. George C. Treadwell Co.* 82 Hun, 376, 63 St. Rep. 790, 31 Supp. 34. See, also, *Halpin v. Mutual Brewing Co.* 91 Hun, 220, affirmed, 148 N. Y. 744. A receiver in an action brought under §§ 1781, 1782, may not distribute the corporate assets. It seems that the debts incurred during such a receivership are not entitled to a preference over the debts of the corporation, and that an order may be made that the receiver pay certain debts in full out of

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the corporate funds in his hands. *Halpin v. Mutual Breweing Co.*, 91 Hun, 220, 148 N. Y. 744, *supra*.

A receiver represents the corporation, so that he has no other or higher equities than those possessed by the corporation. *Butterworth v. O'Brien*, 28 Barb. 187, affirmed, 23 N. Y. 275. As to commercial paper, he does not stand in the position of an innocent, *bona fide* holder for value. *Briggs v. Merrill*, 58 Barb. 389. In *People v. Wall Street Bank*, 39 Hun, 525, it was held that the receiver of a bank had no authority to apply for the reduction of an assessment upon shares of capital stock of the bank on behalf of the stockholders, nor can the court direct the receiver to pay such an assessment.

The receiver holds the property and estate of the corporation as the officer of the court, for the purpose of distribution, under the direction of the court, among creditors and stockholders, and in the absence of fraud or collusion the receiver and the creditors are bound by the action of the corporation. In case where a judgment has been entered against a corporation, it is the duty of the receiver, if any reason exists to question the judgment, to apply to the court rendering it to reopen it and be permitted to defend, otherwise he is bound by it. *Pringle v. Woolworth*, 90 N. Y. 502.

Receivers will not be bound by a waiver, expressed or implied, of a legal defence to an action, nor have they the right to abandon an equitable defence. *Attorney-General v. Life & Fire Ins. Co.* 4 Paige, 224; *McEvers v. Lawrence*, Hoffman's Ch. 171. A receiver is under no obligation to attempt to take property and prove possession of a third person, by force, without an express order of the court directing him to do so. The proper course is for the receiver to call upon the court to decide as to what property the receiver is entitled under the order of the court, and where it is in the possession of the third person who claims the right to retain it, the receiver must proceed by suit against him. *Parker v. Browning*, 8 Paige, 388. And where he desires to obtain possession of books or any other property claimed by the company, which was in its possession, he must institute proper proceedings for their recovery so that there may be a determination of the question of ownership. *Olmstead v. Rochester & Pittsburg R. R. Co.* 46 Hun, 552.

The receiver has no power except that conferred upon him by

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the order of his appointment. *Negus v. City of Brooklyn*, 62 How. 291; S. C. 10 Abb. N. C. 180. The receiver holds moneys which come into his hands subject to the order of the court, to be paid in the manner which the court shall direct, so that even if money has been paid to him by mistake in his official character as receiver, the court, of which he is an officer, can alone direct it to be refunded. *Duffy v. Casper*, 7 Rob. 79; *Getty v. Campbell*, 2 Rob. 664.

A court of equity appointing a receiver *pendente lite* can sell the property in the receiver's hands whenever such course becomes necessary to preserve the interests of all the parties. *Porter v. Fraser*, 57 St. Rep. 516, 6 Misc. 557. A temporary receiver is in all respects subject to the control of the court, and such a receiver appointed before final judgment has his powers defined by § 1788. *Buckley v. Harrison*, 65 St. Rep. 93, 10 Misc. 683, 31 Supp. 999. A temporary receiver appointed in an action to dissolve a corporation who is not authorized by the court to continue the business or sell the property has no authority to employ a truckman, and the latter cannot maintain an action for wages against him in his representative capacity. *Meyer v. Lerox*, 1 App. Div. 116, 37 N. Y. Supp. 67, 72 St. Rep. 220.

A receiver has no authority without the direction or consent of the court to invest the moneys in his hands. In the absence of such direction, it is his duty simply to keep and protect the trust fund and hold it ready for distribution. Where, however, a receiver, without authority of the court but acting in entire good faith, placed the fund in the hands of brokers to be loaned on call and charged himself with the amounts received for interest, it appearing that no part of the fund was lost and that the parties interested therein were not injured but were probably benefited, it was held that an order charging the receiver with interest beyond the amount received, was error. *Attorney-General v. North Amer. Life Ins. Co.* 89 N. Y. 94, modifying 26 Hun, 294.

Where a receiver is directed to sell property subject to the order of the court, any transfer before such confirmation is without authority. The transfer is not void, but voidable in case confirmation is denied, and in that case the transfer will not be operative. *Simmons v. Wood*, 45 How. 262; *Koontz v. Northern Bank*, 16 Wall. 196. An ancillary receiver of a foreign corporation is a mere common-law receiver to protect the property,

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and has only the powers conferred by the order appointing him. Such a receiver is without the authority to sue in this State to set aside a fraudulent transfer of property, made by the corporation as representing the creditors. Such a receiver cannot maintain such an action in any event without showing judgment with execution issued and returned unsatisfied. The allegation of insolvency of the company cannot cure the defect. *Buckley v. Harrison*, 65 St. Rep. 93, 10 Misc. 683, 31 Supp. 999.

The receiver of an insolvent corporation who held the equity of redemption in mortgaged premises and purchased them under the foreclosure of the mortgage held by the corporation of which he is receiver, was held to retain them for the benefit of the *cestuis qui trust*, who may elect and adopt the purchase or demand a resale. This rule is entirely independent of the question whether in fact any fraud has intervened, but is upon the ground that one standing as trustee in respect to property is not permitted to purchase and hold it for his own benefit. *Fewett v. Miller*, 10 N. Y. 402.

A receiver is authorized to incur expense and charges for the preservation and use of the property which has come into his hands by virtue of receivership, and such claim may be enforced against the receiver personally. *Rogers v. Wendall*, 54 Hun, 540. In *Ryan v. Rand*, 20 Abb. N. C. 313, it was held that a receiver was liable to a stenographer who took notes of evidence before a referee appointed to pass on his accounts. In *Sayles v. Jourdan*, 2 Supp. 827, defendant was held individually liable for a balance remaining due under a contract originally entered into with the receiver.

The rule is that a person employed by a trustee, receiver, general assignee, executor or administrator, in matters pertaining to the execution of the trust, must look to the person employing him individually for his compensation, as the contract does not bind the estate he represents. The title to the trust property vests in these different officials and they must account for it to the persons ultimately entitled thereto; they are individually liable because they have no responsible principal behind them for whom they may contract and against whom the creditor may enforce his demand. *Patton v. R. B. P. Co.* 114 N. Y. 4; same rule, *Davis v. Stover*, 16 Abb. (N. S.) 227; *People v. Universal Life Ins. Co.* 30 Hun, 142; *Ryan v. Rand*, 20 Abb. N. C. 314.

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In such case, if the plaintiff cannot recover against the receiver he has no right of action and his claim cannot be enforced, since a receiver cannot, by his own motion, contract debts chargeable upon the fund in litigation; while a court may allow expenses incurred by a receiver for the preservation of the property, it is, nevertheless, the order of the court and not the act of the receiver which creates the charge and upon which its validity depends. *Vilas v. Page*, 106 N. Y. 451. It seems that an agreement may be made by which the receiver may be exonerated from individual liability and contract entered into by which the party performing services may look to the trust estate. *Nero v. Nicoll*, 73 N. Y. 127; *Foland v. Dayton*, 40 Hun, 563; *Martin v. Platt*, 51 Hun, 435. This rule seems to be based upon the ground that a claim may be perfectly proper so far as the plaintiff is concerned, and still improper as against the estate; that the receiver may have been guilty of some act which would render the allowance of the claim against the estate improper. Opinion Martin, J., in *Rogers v. Wendell*, 54 Hun, 544.

In *Raht v. Attrill*, 106 N. Y. 423, 11 St. Rep. 9, where a receiver had made certain expenditures under the order of the court where notice had not been given to the proper parties, it was held that, although strong reasons existed for the expenditure, this did not justify it, that the debt created by the receiver was not one for the preservation of the property and the granting of an order for such expenditure without notice to the mortgagee or bondholders did not bind them as an adjudication.

Where expenditures are necessary for repairs to property in the hands of a receiver of rents and profits, appointed in a foreclosure action, he has no power without order of the court to lessen the fund by expenditures for repairs. *Wyckoff v. Scofield*, 103 N. Y. 630. The rights and duties of a receiver in this respect are formulated in Gluck and Becker on Receivers, page 236, in this language:

"The receiver, as an officer of the court, must act according to the latter's orders, and cannot himself determine the expediency of incurring any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. He has not the power, as incident to his general authority as receiver, to create liens on the property, or bind the trust estate by his contracts. The court

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alone has that power, and may clothe the receiver with authority to make all contracts necessary to the proper protection and use of the trust estate, but until it does clothe him with such power, any contracts made by him are not binding upon the estate or funds in his hands, and it is entirely within the discretion of the court whether it will ratify or disaffirm them." Citing among other authorities, *Vilas v. Page*, 106 N. Y. 439; *Cowdrey v. Galveston, H. & H. R. Co.* 93 U. S. 352.

A receiver cannot, without order of the court, grant a railroad company, other than that which he represents, permission to cross a railway of which he is receiver. *Howlett v. N. Y., West Shore & Buffalo R. R. Co.* 14 Abb. N. C. 328, affirmed, 28 Hun, 55. Where, after a trial and decision adverse to plaintiff in an action in which a receiver *pendente lite* had been appointed, but before judgment, an order was granted continuing the receivership until after the decision of any appeal from the judgment, the receiver was held to have no authority after entry of judgment to bring an action to recover a claim, a part of the assets in his hands as receiver. *Colwell v. Garfield Nat. Bank*, 119 N. Y. 408.

Where the receiver of an insolvent company continued to occupy and use premises, after his appointment, theretofore used by the company, he was held liable for the rent during the period of such occupation, and it was held error to refer the matter to a general referee appointed to pass on claims against the corporation. *People of State of N. Y. v. The Universal Life Ins. Co.* 30 Hun, 142. The general rule is that when a receiver under orders of the court continues to use property theretofore used by the corporation, there is a just claim against him and will be directed to be paid out of the assets which come into his hands. *Myers v. Car Co.* 102 U. S. 1; *Kneeland v. Amer. Loan & Trust Co.* 136 U. S. 89.

In *People v. Globe Mut. Life Ins. Co.* 91 N. Y. 174, it was held that the agent of an insolvent corporation had no valid claim upon the fund in the hands of a receiver for damage for an alleged breach of a contract because of the discontinuance of the employment, at least in the absence of evidence that it was some fault of the company which brought about the insolvency. It seems that as between the company and the person thus contracting, its dissolution by virtue of proceedings on the part of the people is to be deemed the independent act of the State, and not the act of

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the corporation, and the person contracting took the risk of any act or neglect on the part of the other officers of the corporation. See *Lorillard v. Clyde*, 142 N. Y. 456. But a lease to a corporation is not terminated by its dissolution, and its covenant to pay rent does not thereupon cease to be obligatory, and a receiver is authorized to retain out of its assets sufficient to cancel and discharge such open and subsisting engagements. *People v. Nat. Trust Co. of City of New York*, 82 N. Y. 283.

As to obligation of a receiver for payment of a note received by the corporation of which he is receiver before its maturity, and which was canceled and surrendered to the maker upon payment being made to him, see *Arnot v. Bingham*, 55 Hun, 553, where it is held that the owners of the note are entitled to collect from the receiver the avails so collected by the bank. See, also, *People of the State of New York v. The Bank of Dansville*, 39 Hun, 187, and upon the same point, *McColl v. Frazier*, 40 Hun, 111. See *Importers & Traders' Nat. Bank of New York v. Peters*, 123 N. Y. 272, as to recovery of moneys held by a person in a fiduciary capacity which he had deposited in his account at the bank, by reason of fraudulent action on the part of the bank after appointment of a receiver. See, also, *Drexel v. Pease*, 129 N. Y. 96, 133 N. Y. 133.

In *People v. Merchants & Mechanics' Bank*, 78 N. Y. 269, an order requiring a receiver to pay certain moneys upon the ground that the assets came into the hands of the receiver impressed with a trust in favor of the party making the application, it was held that in order to authorize such relief, it was necessary to trace into the hands of the receiver money or property which belonged to the party making the application or which had before the receivership been set apart and appropriated for its benefit. Where a creditor of a savings bank obtained a judgment against a receiver thereof in an action brought against the bank for the appointment of a receiver, in which action the receiver was substituted as defendant, plaintiff was not entitled to a preference over depositors in the payment of his judgment. *People v. Mechanics & Traders' Savings Bank*, 92 N. Y. 7, reversing 28 Hun, 375.

The receiver of an insolvent corporation represents both the creditors and stockholders, and may assert their rights when affected by the fraudulent or illegal acts of the corporation. *Gillett v. Moody*, 3 N. Y. 479. The receiver of a corporation is the immediate representative of the corporation. Taking as such the

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corporate title to its property and being subject to corporate disabilities, he has only the power over the property conferred upon him by statute. *Curtis v. Leavitt*, 15 N. Y. 9. The receiver may maintain an action against its stockholders to recover dividends received by them while the corporation was insolvent; *Curtis v. Laytin*, 3 Keyes, 521; but he cannot impeach the lawful acts of the corporation. *Hyde v. Lynde*, 4 N. Y. 387. He is vested with all the property and effects of the corporation and has full power to sell and dispose of the same and settle its affairs. *Verplanck v. Merchants' Ins. Co.* 2 Paige, 438; *White v. Haight*, 16 N. Y. 316. He may repudiate an illegally executed contract of the corporation and reclaim the property. *Tallmadge v. Pell*, 7 N. Y. 328. It is the duty of a receiver to so administer the assets that a fraudulent claim shall have no share in the distribution. *McParland v. Bain*, 26 Hun, 38. See further as to his powers, *Libby v. Rosckrans*, 55 Barb. 202; *Sands v. Birch*, 29 How. 305; *Brown v. Hill*, 1 Sandf. 629. A receiver of a corporation occupies the position of a trustee for the corporate funds, for the benefit of persons interested therein. *Kimberly v. Stewart*, 22 How. 281; *McParland v. Bain*, 26 Hun, 38. He is vested with all the rights of action the company had when he was appointed, and he can sue for a tort committed before his appointment. *Gillett v. Fairchild*, 4 Den. 80. But he cannot impeach or disaffirm the authorized acts of the corporation or its agents, and his appointment does not change the relation between the corporation and parties with whom it has been dealing. *Shaughnessy v. Reusselacr Ins. Co.* 21 Barb. 605; *Williams v. Babcock*, 25 Barb. 109; *Bell v. Sibley*, 33 Barb. 610; *Savage v. Medbury*, 19 N. Y. 32; *Davenport v. Beardsley*, 23 Barb. 656. A receiver of an insolvent corporation may assign a chose in action due the corporation without using the corporate seal; he should act, contract and convey in his own name. *Hoyt v. Thompson*, 5 N. Y. 320. He can enforce the common-law liability of a trustee of a savings bank for a misapplication of the funds. *Van Dyck v. McQuade*, 57 How. 62. He may discharge existing policies of insurance, but not reinsure. *In re Croton Ins. Co.* 3 Barb. Ch. 642. He may apply for a warrant to bring up for examination any person who is indebted to the corporation, or who has property belonging to it in his custody. *Noble v. Halliday*, 1 N. Y. 330. He may continue a suit, brought by the insolvent

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corporation, in his own name or that of the original party. *Albany Ins. Co. v. Van Vranken*, 42 How. 281. He cannot, without consent of all parties interested, allow a claim which is not a charge on the trust fund, and he is bound to defend against an unjust claim. *Attorney-General v. Life & Fire Ins. Co.* 4 Paige, 224. But he is not bound to disallow a just claim which is barred by the Statute of Limitations. *Sands v. Hill*, 42 Barb. 651. It is his duty to collect the assets of the corporation and reduce its choses to possession, and with all convenient haste to make distribution among the creditors and other parties entitled. Beach on Receivers, § 439, and cases cited. It is his duty to collect all the debts due the company. *Van Buren v. Chenango Ins. Co.* 12 Barb. 671. By chapter 71, Laws 1852, receivers of mutual insurance companies are given certain powers. By chapter 239, Laws 1844, and chapter 26, Laws 1866, certain rights are given receivers of banking corporations. By chapter 709, Laws 1867, duties are imposed on receivers of fire insurance companies, and by chapter 537, Laws 1880, certain reports are required to be made by receivers to the attorney-general, and procedure is defined in case of their failure to do so. As to the right to disaffirm acts of corporation done in fraud of creditors, see *Brouwer v. Hill*, 1 Sandf. Ch. 629; *Gillett v. Moody*, 3 N. Y. 479; *Talmadge v. Pell*, 7 N. Y. 382; *Tuckerman v. Brown*, 33 N. Y. 297; *Brouwer v. Harbeck*, 9 N. Y. 589. A receiver being an officer of the court and subject to its direction, and being charged with responsible and often embarrassing duties, it is proper that he should, on suitable occasions, apply to the court for instructions. *Matter of Van Allen*, 37 Barb. 225. And if there is danger that the fund will be unfairly distributed, he may apply to the court for its protection. *People v. Security, etc. Co.* 79 N. Y. 267. If a judgment has been obtained against a corporation, a receiver may have it vacated if it was obtained fraudulently, collusively or without consideration. *Whittlesy v. Delancy*, 73 N. Y. 571. Where a receiver, in an action against a corporation, fraudulently obtains an order for the sale of a debt due the corporation, an equitable action, at the suit of the creditor, will lie to vacate the order and set aside the sale. *Hackley v. Draper*, 60 N. Y. 88, affirming 2 Hun, 523. An action will not lie against a receiver to recover for services rendered the corporation after the appointment of a receiver. *Barnes v. Newcomb*, 89 N. Y. 108. But where a party obtained judgment

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in an action brought before appointment of a receiver, the expense of the action being incurred for the benefit of the fund, the receiver will be required to pay the costs out of the fund. *Locke v. Covert*, 42 Hun, 484. A contract of sale, made by the receiver of an insurance company, is, while executory, subject to the supervision of the court, which may sanction or disapprove it. If the sale appears to be inequitable, the court will refuse to direct the receiver to complete it. *Attorney-General v. Continental Life Ins. Co.* 94 N. Y. 199. A court which has, in its exercise of a rightful jurisdiction, appointed a receiver, can make an order prohibiting any after interference, by way of levy or seizure, with the property in his possession, outside of the provisions of the Code. *Woerishoeffer v. North River Construction Co.* 99 N. Y. 398. The authority of the court to compel the receiver of a corporation to allow a creditor to make extracts from the books of the corporation rests on grounds of justice and equity in administering the trust, and the granting or refusing an application of that character is in the discretion of the court. *Matter of Tiebout*, 19 Week. Dig. 570. It is proper that a judgment against a receiver, sued as such, have a direction that he pay it "out of any funds which are or may hereafter come into his hands or under the direction of the court applicable to that purpose." *Woodruff v. Jewett*, 37 Hun, 205. The receiver of the property of a railroad company has no power incident to his general authority as such, to create a lien on the property of the company, for the purchase of rolling stock. *Vilas v. Page*, 11 St. Rep. 416. A receiver appointed in an action to foreclose a mortgage given by a railroad corporation is not authorized to issue certificates to pay the claims of employes of the railroad, for labor performed before his appointment. It has become the settled rule of the court that when it takes charge of a property through a receiver, the expenses of realization, and also expenses of preservation, may be incurred under the order of the court on the credit of the property and paid out of the income, or, when necessary, out of the *corpus* of the property before distribution. *Metropolitan, etc. Co. v. Tonawanda R. R. Co.* 2 St. Rep. 69. There is no exception to the rule that the receiver cannot either sue or be sued without leave of the court making the appointment. Where an action has been commenced against a receiver without leave, the court acquires jurisdiction of the defendant receiver by the service of a summons, and the

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remedy is, either to stay all proceedings on the part of the plaintiff, or punish plaintiff for contempt of court, or both. *James v. James Cement Co.* 8 St. Rep. 490, and cases cited.

Leave to sue, improvidently granted, may be revoked. *Attorney-General v. North Am. Ins. Co.* 6 Abb. N. C. 426. The receiver of a foreign corporation cannot be sued. *Kilmer v. Hobart*, 8 Abb. N. C. 426. The court appointing a receiver has power to order reference of a claim against him without action. *Guardian Savings Inst. v. Bowling Green Savings Bank*, 65 Barb. 275. A receiver of a railroad company, appointed on application of judgment creditors, is not authorized to pay claims for work and materials furnished before his appointment. *Powers v. Jourdan*, 4 St. Rep. 839. Unless mutual debts exist at the time of the appointment of a receiver, he has no authority to allow a set-off. *New Amsterdam Savings Bank v. Tartter*, 4 Abb. N. C. 215. In order to prove the appointment of a receiver it is sufficient to produce the petition, the order appointing him, and his official bond. *Palmer v. Clark*, 4 Abb. N. C. 25. But he is not obliged to redeem stock which the firm had pledged by paying the debts secured by such pledge. *Chamberlain v. Greenleaf*, 4 Abb. N. C. 178. Upon being indemnified for costs, the receiver should enforce any legal liability existing against directors of a company for the benefit of all concerned. *People v. Security Ins. Co.* 6 Week. Dig. 46. The court, in the administration of funds through a receiver, will see that he is protected against needless annoyance and interference in the discharge of his duties, and that parties wilfully embarrassing him are arrested and punished. *Eddy v. Co-operative Dress Asso.* 3 Civ. Pro. R. 434. Creditors are only entitled, through a receiver, to the property, real and personal, things in action, contracts and effects of the corporation so far as they were owned by it at the time of his appointment, subject to any existing mortgage or lien. *Whitney v. N. Y. & Atlantic R. R. Co.* 32 Hun, 165.

A temporary receiver of an insolvent corporation, appointed in an action of sequestration, has power under section 1788 of the Code to maintain an action to recover from a third party, money collected by the defendant under a judgment entered against the insolvent corporation upon an offer made by it for the purpose of giving an unlawful preference and the insolvent corporation is not a necessary or proper party defendant to such action. *Nealis*

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as *Receiver v. American Tube and Iron Co.* 150 N. Y., affirming 76 Hun, 220.

Prior to chapter 376, Laws 1885, a receiver could not be authorized by the court to pay or issue certificates of indebtedness for the payment of labor and services in operating the road prior to his appointment, and to make certificates so issued a lien prior to the mortgage. *Metropolitan Trust Co. v. Tonawanda, etc. R. R. Co.* 103 N. Y. 245. A receiver of an insolvent national bank acquires no title to property in the custody of the bank which it does not own, as against the owner. *Corn Exchange Bank v. Blye*, 101 N. Y. 303. No formal conveyance is necessary to a receiver "of all the assets and credits" of an insurance company; he becomes vested with the title on his appointment. *Attorney-General v. Mutual Life Ins. Co.* 100 N. Y. 279.

A receiver was held to be individually bound to pay a bill for stenographer's fees for notes of evidence before a referee to state the receiver's accounts. *Ryan v. Rand*, 20 Abb. N. C. 313. A receiver is personally liable upon any contract made by him, although for the benefit of the corporate property he may have a claim allowed upon his accounting, but it is not a lien upon assets in his hands. *Rogers v. Wendell*, 54 Hun, 540; *Sayles v. Jourdan*, 2 Supp. 827.

For liability of receivers of insolvent insurance companies to policy-holders, see *People v. Security Life Ins. & Annuity Co.* 78 N. Y. 115; *Attorney-General v. Guardian Mut. Life Ins. Co.* 82 N. Y. 336; *People v. Empire Mut. Life Ins. Co.* 92 N. Y. 105; *People v. Knickerbocker Life Ins. Co.* 40 Hun, 44; *People v. Universal Life Ins. Co.* 42 Hun, 616. In *Attorney-General v. Continental Life Ins. Co.* 88 N. Y. 571, the petitioner asking payment of counsel fees was retained by the attorney-general to appear for him in an action in which the receiver was appointed, and set out services rendered by him; it was held that the amount claimed for such services could not be paid out of the funds in the hands of the receiver. In *Matter of Attorney-General v. North Amer. Life Ins. Co.* 91 N. Y. 57, it was held that the court had no power to make an allowance to interveners in an action for the dissolution of a life insurance company out of the funds in the hands of the receiver, for their disbursements and counsel fees, as they were simply individual parties protecting their own interest. Same effect, *Attorney-General v. Continental Life Ins. Co.* 31 Hun,

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623. In *Barnes v. Newcomb*, 89 N. Y. 108, an action was brought by an attorney against the receiver of an insurance company to recover for services rendered the company in opposing an application for the receiver's appointment; it was held the action would not lie, but that the claim should be presented to the court appointing the receiver and the discretion of that court exercised with reference to it.

A receiver is bound to comply with his contracts, where they are made with the permission or by the direction of the court. *Matter of U. S. Rolling Stock Co.* 57 How. 17; *Jay v. De Groot*, 2 Hun, 205. The court may, on petition and application of the attorney-general, and on notice to the insolvent corporation and the receiver, in its discretion, make an order directing him to pay a tax imposed upon the corporation, since the claim of the State for the payment of the tax is a paramount one. *Central Trust Co. v. N. Y. City & Northern R. R. Co.* 110 N. Y. 250, reversing 47 Hun, 587.

The costs of an action to which a receiver is a party should be paid in full, and an order may be made for that purpose where costs have been awarded against him. This is true although the action may have been originally brought against the corporation if a receiver has defended. *Locke v. Covert*, 42 Hun, 484; *Columbian Ins. Co. v. Stevens*, 37 N. Y. 536; *Camp v. Receivers of Niagara Bank*, 2 Paige, 283.

Upon proof of loss sustained by reason of the receiver's neglect of duty, he is chargeable with such loss. *Clapp v. Clapp*, 49 Hun, 195. Where a receiver deposits funds in his own individual name and not as receiver, mingling them with his own funds, if the bank fails he will be charged with the loss resulting. *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *Matter of Stafford*, 11 Barb. 353. In *Cardot v. Barney*, 63 N. Y. 281, it was held that a person acting as receiver of an insolvent railroad corporation and running the road, was not personally liable in an action for negligence where no personal neglect was imputed to him either in the selection of agents or in the performance of any duty, but where the negligence was that of a subordinate employed in compliance with the order of the court.

In *Kain v. Smith*, 80 N. Y. 458, it was sought by counsel to have this rule extended so as to relieve receiver, as such, from liability. The court, however, distinguished the liability of the

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person acting as receiver in his individual capacity and the liability of the trust fund, holding that damages for injury to the person would be chargeable upon and payable out of the fund in court, the same as other expenses of administration.

This principle was applied in *Camp v. Barney*, 4 Hun, 373, and in *Graham v. Chapman, Receiver*, 33 St. Rep. 349, it is held that a receiver must be held liable for injuries to his employe, in the same manner and to the same extent as the corporation itself would be held if it had not gone into the hands of a receiver. See, also, *Durkin v. Sharp*, 88 N. Y. 225; *Fuller v. Jewett*, 80 N. Y. 46. In a note to 15 L. R. A. 120 attention is called to the fact that *Cardot v. Barney* has not been followed even in this State, and has been severely criticised in other States. It is stated that this decision probably arises from the fact that the action was brought against the receiver personally.

A receiver of a corporation has no power to issue certificates which will be binding upon a trust estate unless authorized to do so by order of the court, and the holder of such certificates so issued without authority has no legal claim against the trust property in order to claim equitable relief; he must show the money represented therein was issued for the benefit of the estate. *Wesson v. Chapman*, 77 Hun, 144, 28 Supp. 431, 59 St. Rep. 44. Receivers' certificates do not bind parties who are not concluded by the judgment and proceedings in the action in which they were issued. *Stevens v. Union Trust Co.* 57 Hun, 498.

In *Raht v. Attrill*, 106 N. Y. 423, receivers' certificates issued on an *ex parte* order were held not to create a lien in preference to the bondholder. Where the certificates were issued in payment of debts of the corporation, the court has no power to authorize a receiver to pay or issue certificates of indebtedness for the payment of labor and services in operating the road prior to his appointment, and to make certificates so issued a lien prior to the mortgage. *Metropolitan Trust Co. v. Tonawanda Valley & Cuba R. R. Co.* 103 N. Y. 245.

Rule 81. Receiver : power of, to employ counsel.

No receiver shall have power to employ more than one counsel, except under special circumstances and in particular cases requiring the employment of additional counsel, and in such cases only upon special application to the court, showing such circumstances by his petition or affidavit, and on notice to the party or person on whose behalf or application he was appointed. This rule

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shall apply to all receivers, present and future ; and no allowance shall be made to any receiver for expenses paid, or made, or incurred in violation of this rule.

ARTICLE V.

DISCHARGE OF RECEIVER.

SUB. 1. REMOVAL OF RECEIVER.

2. COMPENSATION OF RECEIVER.

3. ACCOUNTING BY RECEIVER.

4. EFFECT OF DISCHARGE OF RECEIVER.

SUB. 1. REMOVAL OF RECEIVER.

Section 7, Laws of 1883, chapter 378, is as follows :

The attorney-general may at any time he deems that the interest of the stockholders, creditors, policy-holders, depositors or other beneficiaries interested in the proper and speedy distribution of the assets of any insolvent corporation will be subserved thereby, make a motion in the supreme court, at a special term thereof, in any judicial district, for an order removing the receiver of any insolvent corporation and appointing a receiver thereof in his stead, or to compel him to account, or for such other and additional order or orders, as to him may seem proper, to facilitate the closing up of the affairs of such receivership ; and any appeal from any order made upon any motion under this section shall be to the general term of said court of the department in which such motion is made.

A receiver appointed in an action against a corporation should not be removed without notice of the application having been given to the plaintiff in the action at whose instance he was appointed. He cannot be removed in an application made in another district from that in which he was appointed. *Attrill v. Rockaway Beach Improvement Co.* 25 Hun, 376, First Department, October Term, 1881 ; same rule in S. C. 25 Hun, 500, November Term, 1881. The power of the court to remove the receiver of a corporation does not depend on any notice to stockholders who have appeared. The court can act on its own motion *ex parte*. *Hoyt v. Continental Ins. Co.* 21 Week. Dig. 145, General Term, Second Department, February, 1885. Where a motion is made to vacate an order appointing a receiver on the ground that another receiver has been appointed, it is error, on denying such motion, to remove the second receiver and appoint another on grounds not stated in the moving papers. *Bruns v. Stewart Man'f'g Co.* 31 Hun, 195. Where a director of a company was appointed receiver, and it afterward appeared he had been connected with its mismanagement, he was removed. *Keeler v.*

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Brooklyn Elevated R. R. Co. 9 Abb. N. C. 166. Under chapter 409, Laws 1882, § 163, his successor may bring an action against a receiver so removed.

A receiver may be removed in the sound discretion of the court. *Seney v. N. Y. Consolidated Stage Co.* 28 How. 481, 18 Abb. 435; *Ferry v. Bank of Central New York*, 15 How. 445; *Wilson v. Barney*, 5 Hun, 257. It was held error for a Special Term sitting in Albany to remove the receiver of a corporation appointed in an action the venue of which was laid in the county of New York. *Attrill v. Rockaway Beach Improvement Co.* 25 Hun, 376. A receiver should have notice of an application for his removal. *Bruns v. Stewart Manufacturing Co.* 31 Hun, 195. See Laws of 1880, chapter 537; Laws of 1881, chapter 639, referred to in 25 Hun, 509, relative to removal of receivers of insolvent corporations.

The duties of a temporary receiver terminate with a judgment adverse to the party who procures his appointment, but he is not wholly discharged, remaining amenable to the court for the purpose of accounting. *Whiteside v. Prendergast*, 2 Barb. Ch. 471; *McCosker v. Brady*, 1 Barb. Ch. 329; *Ireland v. Nichols*, 40 How. 87; *Colwell v. Garfield National Bank*, 119 N. Y. 412. As to what statutes are sufficient ground for removal, see *Bank of Monroe v. Schermerhorn*, 1 Clarke's Ch. 366; *Wetter v. Schlieper*, 7 Abb. 92; *Keeler v. Brooklyn Elevated R. R. Co.* 9 Abb. (N. Y.) 166; *Wilson v. Barney*, 5 Hun, 257.

SUB. 2. COMPENSATION OF RECEIVER.

Sections 2 and 5 of chapter 378, Laws 1883, provide as follows:

§ 2. Compensation of receivers; division in certain cases.

Every receiver shall be allowed to receive as compensation for his services as such receiver, five per cent for the first one hundred thousand dollars actually received and paid out, and two and a half per cent on all sums received and paid out in excess of the said one hundred thousand dollars. But no receiver shall be allowed or shall receive from such percentages or otherwise, for his services, for any one year, any greater sum or compensation than twelve thousand dollars, nor for any period less than one year, more than at the rate of twelve thousand dollars per year, provided that where more than one receiver shall be appointed, the compensation herein provided shall be divided between such receivers. (Thus am'd by L. 1886, chap. 275.)

§ 5. Interveners to pay their own expenses.

In case of the intervention of any policy-holder or depositor by permission of the court, such policy-holder or depositor shall defray the legal expenses thereof,

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and no allowance shall be made for costs or fees to any attorney of such policyholder or depositor.

Section 76, 3 R. S., chapter VIII, title IV, is as follows:

Receivers' commissions.

Such receivers shall, in addition to their actual disbursements, be entitled to such commissions as the court shall allow, not exceeding the sum allowed by law to executors or administrators.

See § 3320 of Code as to fees.

Prior to the passage of the act of 1883, the commissions of a receiver of an insolvent life insurance company were fixed by the court which appointed him, not exceeding, however, five per cent on the amount of receipts and disbursements. *Attorney-General v. Guardian Life Ins. Co.* 93 N. Y. 631. Followed, *Matter of Security Life Ins. Co.* 31 Hun, 36, affirmed, 95 N. Y. 654. The act of 1883, in relation to receivers of corporations, including the second section thereof, in relation to receiver's fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in that section — they are governed by § 3320. *United States Trust Co. v. N. Y., W. S. & B. R. R. Co.* 101 N. Y. 478. As to what funds a receiver of a life insurance company is entitled to commissions upon, see *Attorney-General v. North American Life Ins. Co.* 89 N. Y. 94, modifying 26 Hun, 294. And as to what is to be considered in fixing compensation, see *Matter of Commonwealth Fire Ins. Co.* 32 Hun, 78. Commissions will not be allowed a receiver upon money merely turned over to him by his predecessor in office; such funds, when they come into the second receiver's hands, are to be regarded as *in custodia legis*. *Attorney-General v. Continental Life Ins. Co.* 32 Hun, 223. In computing the commissions of the receiver of a corporation upon accepting his resignation, only the amount of money which has actually come into his hands should be considered as a basis of computation. *People v. Mutual Benefit Association*, 39 Hun, 49.

Under chapter 378, Laws 1883, the courts should carefully scrutinize the receiver's charges. Abb. Ann. Dig. 1885, p. 298. Where the justice, by whom certain orders passing the accounts of the receiver of a corporation, and allowing him commissions for his services were made, had jurisdiction to entertain the proceedings before him, and made the allowance for commissions,

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but the amounts allowed were erroneous, *held*, that the proper procedure was an application to the same justice to resettle the order, or by appeal. *In re National Trust Co.* 4 Civ. Pro. R. 203. By § 3320 a receiver, except as otherwise provided by statute, is entitled to a commission not exceeding five per cent, and those cases of compensation of receivers not governed by Laws 1883 are subject to the control of the Supreme Court at Special and General Term. *Hanover Ins. Co. v. Germania Ins. Co.* 11 St. Rep. 481.

In the absence of legislation, the court has the right of determining the compensation of receivers. *Matter of Commonwealth Fire Ins. Co.* 32 Hun, 78. It will be noted, however, that the statute heretofore cited fixed the compensation of receivers of corporations. The court has no power to allow a receiver any commission in excess of that prescribed by statute under the guise of extra compensation. *Matter of Orient Mut. Ins. Co.* 21 Supp. 237, 50 St. Rep. 460, citing *Matter of Security Life Ins. & Annuity Co.* 31 Hun, 36, which was affirmed 95 N. Y. 654. In chapter 465, Laws of 1892, the receiver may, however, be allowed the disbursements paid his sureties on his sufficient bond.

Where a receiver was never entitled to receive all the money in question, and the order directing payment to him was erroneous and reversed, it was held that the court had no discretion to permit the receiver to retain a sum to cover his commissions and counsel fees. *Pittsfield Nat. Bank v. Bayne*, 140 N. Y. 321. Where the course of a receiver has been marked with neglect, inattention and misconduct, resulting in probable losses, which to a great extent could have been avoided if he had properly discharged his duties, the court may properly refuse to allow him any commissions by way of compensation. *Clapp v. Clapp*, 40 Hun, 196. Where a receiver is an intruder and trespasser, he is not entitled to receive any compensation. *O'Mahoney v. Belmont*, 62 N. Y. 133.

In *Verplanck v. Winchester Mercantile Ins. Co.* 2 Paige, 438, where the chancellor reversed the order appointing a receiver, he was not allowed any compensation. The act of 1883, chapter 378, was held not to apply to a receiver appointed to conserve property on foreclosure of a mortgage executed by the corporation. *The United States Trust Co. of N. Y. v. New York, West Shore & Buffalo Ry. Co.* 101 N. Y. 478. Where a receiver does

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not take possession or control of the property and allows the business to proceed as before under the management of parties in interest who receive and disburse the fund with his assent and approval, he is not entitled to a percentage on such moneys. *Matter of Woven Tape Skirt Co.* 85 N. Y. 506; nor is he entitled to commissions on the amount of incumbrances on property sold by him unless he himself pays off and discharges the incumbrances before the sale. *Matter of Security Life Ins. & Annuity Co.* 31 Hun, 36, affirmed, 95 N. Y. 654. The allowance to a receiver is intended to cover the receiving and disbursing of the fund. *Howes v. Davis*, 4 Abb. 71; *Matter of the Bank of Niagara*, 6 Paige, 213. In case of change of receivers by death or otherwise, one-half of the percentage on moneys in the hands of the first receiver should be allowed to each. *Attorney-General v. Continental Life Ins. Co.* 32 Hun, 223. The court has no power to make any allowance to interveners out of funds in the hands of a receiver for counsel fees. *Matter of Attorney-General v. North Amer. Life Ins. Co.* 91 N. Y. 57. Same, *Attorney-General v. Continental Life Ins. Co.* 31 Hun, 623. Nor will any allowance be made to counsel retained by the attorney-general to appear in an action in which the receiver was appointed. *Attorney-General v. Continental Life Ins. Co.* 88 Hun, 571.

SUB. 3. ACCOUNTING BY RECEIVER.

Section 42, 3 R. S., title IV, chapter VIII, is as follows:

§ 42. Receiver's general powers and duties.

Such receiver shall possess all the power and authority conferred, and be subject to all the obligations and duties imposed in article three of this title, upon receivers appointed in case of the voluntary dissolution of a corporation. It shall be his duty to keep an account of all moneys received by him, and on the first days of January, April, July and October, in each and every year, to make and file a written statement, verified by his oath that such statement is correct and true, showing the amount of money received by such receiver, his agents or attorneys, the amount he has a right to retain under the provisions of this title, and the items for which he claims to retain the same, and the distributive share due each person interested therein. He shall pay such distributive share to the person or persons entitled thereto, on demand, at any time after such statement. Such account, statement and all books and papers of the corporation in the hands of such receiver shall, at all reasonable times, be open for the inspection of all persons having an interest therein. And in case of neglect or refusal to comply with either of the above requirements, or any duty imposed upon him by this title, the supreme court, at either a general or special term, shall, on the application of the party aggrieved, unless such neglect or refusal shall be satisfactor-

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ily explained to the court, forthwith remove such receiver and appoint some suitable person as receiver in his place. Such removal shall not vitiate or annul any legal proceedings had by such receiver, but such proceedings shall be continued by such successor as if no removal had been made. Such receiver shall also be liable to pay to the party aggrieved interest at the rate of ten per cent per annum on all moneys due to such party and retained by him more than one day after such demand made as aforesaid.

Thus amended by Laws 1858, chapter 348, and saved by the repealing act of 1880, which declares the section "applicable to a permanent receiver appointed as prescribed by § 1788 of the Code of Civil Procedure."

Sections 66 to 89, 3 R. S., title IV, chapter VIII. are still in force and should be referred to.

A *de facto* receiver cannot avail himself of an irregular or void appointment, under which he has acted, procured by his connivance, and thus escape an accounting for the moneys which came into his hands. *O'Mahoney v. Belmont*, 62 N. Y. 133. Upon the accounting of a receiver of a corporation, where the order for the accounting requires service of notice upon the creditors named in the application, such creditors have a right to appear and be present at the accounting. *Greason v. Goodwillie Wyman Co.* 38 Hun, 138. The receiver should keep the trust funds separate or he will be charged with interest. *Utica Ins. Co. v. Lynch*, 11 Paige, 520; *In re Commonwealth Ins. Co.* 32 Hun, 78. If he exercise his best judgment, in the investment of funds, he will not be charged for losses. *Hynes v. McDermott*, 3 St. Rep. 582. Where, upon the examination of the accounts of a receiver, no misconduct is shown, he will not be chargeable with costs. *Hynes v. McDermott*, 3 St. Rep. 582. A receiver's charges, in his account of expenditures, must be reasonable, and what is reasonable is for the court to determine. Beach on Receivers, § 749. If, during the pendency of proceedings instituted for an accounting by the receiver of a corporation, one of the receivers die, the court may make an order reviving and continuing the accounting against his representatives. *Matter of Foster*, 7 Hun, 129; *Matter of Columbian Ins. Co.* 30 Hun, 342. A master's report upon a receiver's account need not be confirmed, and cannot be excepted to. If a party be dissatisfied he should ask leave of the court to review the principle upon which the account is taken. *Brower v. Brower*, 2 Edw. 621. Where it is sought to review proceedings had upon the settlement of a receiver's

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account by a creditor, he should apply to be made a party to the action and to have the order vacated. *Schenck v. Ingraham*, 4 Hun, 67, 5 Hun, 397. Chapter 378, Laws of 1883, requiring the accounts of the receiver of an insolvent company to be filed with the General Term of the Supreme Court, to pass upon their correctness, or to determine whether or not they should be approved, requires nothing more than that they shall be placed upon the files of the court. Where the accounts so filed embrace many items, as paid to attorneys and counsel, the correctness of which the court cannot determine from a mere inspection of the account, it will appoint a referee to determine whether the services have been rendered, and whether the charges made therefor are just and proper, notice of the hearing before him being required to be given to the attorney-general and to the receiver. *People v. Knickerbocker Life Ins. Co.* 18 Week. Dig. 492, 31 Hun, 622. Where the attorney of the receiver was his partner and made the application upon his own petition without notice, it was held the order granting compensation might be attacked collaterally. *Matter of Commonwealth Fire Ins. Co.* 32 Hun, 78. Where the receiver makes unauthorized loans, but charges himself with the interest received, he will not be charged a greater sum. *Attorney-General v. North Am. Life Ins. Co.* 89 N. Y. 94.

The accounts of a receiver shall be filed and presented to the court before reference is granted to pass upon such accounts. *People of State of New York v. Columbia Car Spring Co.* 12 Hun, 585. Where the conduct of a receiver rendered a reference necessary to examine his accounts, he was charged with one-half the expense of this examination. *Corey v. Long*, 43 How. 492. But ordinarily the receiver will not be compelled to pay the costs of a reference to settle his accounts. *Attorney-General v. Continental Life Ins. Co.* 27 Hun, 524, affirmed, 93 N. Y. 45. He will be allowed his reasonable expenses; *Corey v. Long*, 43 How. 492; *Howes v. Davis*, 4 Abb. 71; including counsel fees. *Matter of Commonwealth Fire Ins. Co.* 32 Hun, 78; *Clapp v. Clapp*, 49 Hun, 195; *Corey v. Long*, 43 How. 492; *Utica Life Ins. Co. v. Lynch*, 2 Barb. Ch. 573. A receiver may not charge counsel fees for himself. *Matter of Bank of Niagara*, 6 Paige, 213; *Collier v. Munn*, 41 N. Y. 147. A receiver may appeal from a determination to settle his accounts. *Matter of Guardian Savings Inst.* 78 N. Y. 408.

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SUB. 4. EFFECT OF DISCHARGE OF RECEIVER.

In *New York & Western Union Tel. Co. v. Jewett*, 115 N. Y. 166, it was held that where a receiver was discharged pending proceedings to compel him to pay the claim of a creditor out of assets in his hands, his discharge was a sufficient ground for denying the application. And where an interlocutory judgment had determined the amount of the plaintiff's claim and the liability of the receiver to pay it, a discharge was held not to be a defence against the entry of final judgment. *Woodruff v. Jewett*, 115 N. Y. 267. In *Miller v. Loeb*, 64 Barb. 454, it was held that the discharge of a receiver was no answer to a motion for leave to bring an action against him for the claim and delivery of the property, the claimants having had no notice of the application to discharge the receiver, he being aware of the claim.

ARTICLE VI.

PRECEDENTS RELATING TO RECEIVERSHIP OF CORPORATIONS.

Order Appointing Temporary Receiver.

At a Special Term of the Supreme Court of the State of New York, held at the City Hall, in the city of Albany, on the first day of April, 1895.

Present — Hon. D. Cady Herrick, *Justice*.

(Title.)

(Insert proper recitals.)

It is ordered,

First. That Howard Gillespie, of Saugerties, county of Ulster, and State of New York, be, and he hereby is appointed receiver of all of the property of said Sheffield Manufacturing Company, with the usual powers and duties of receivers in such cases.

Second. That before entering upon the duties of his trust the said receiver execute to The People of the State of New York, and file with the clerk of this court, his bond, with two sufficient sureties, to be approved by a justice of this court in the penal sum of fifty thousand dollars, conditioned for the faithful performance of his duties as such receiver, and the duty of accounting for all moneys and property received by him.

Third. That said receiver deposit all funds of the corporation, not needed for immediate disbursement, in the First National Bank of Saugerties, subject to the order of this court.

Fourth. That the said receiver be, and he hereby is, authorized and directed from and after the execution, approval and filing of his bond aforesaid, to continue operating the shops and works of said corporation to the extent that he may deem it wise, prudent and

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necessary for the purpose of preserving the assets of said corporation and the market-value of its property, or for such other purpose for which he may deem it necessary.

Enter in Ulster county.

D. CADY HERRICK,
Jus. Sup. Ct.

Notice of Motion on Application for Order Extending Powers of Temporary Receiver and Directing Sale of Property.

(Title.)

Sir:

Please take notice that upon the papers and proceedings herein, and upon a petition, a copy of which is herewith served upon you, a motion will be made at a Special Term of the Supreme Court to be held at the city hall, in the city of Kingston, on the sixth day of April, one thousand eight hundred and ninety-five, at the opening of the court on that day, or as soon thereafter as counsel may be heard, for an order extending to the temporary receiver herein sundry powers and duties of a permanent receiver and granting him leave to sell sundry personal property held by him as such receiver, and for such other or further relief or order as to the court may seem just.

Dated Saugerties, N. Y., April 5th, 1895.

Yours, etc.,
EDGAR M. HAINES,
Attorney for Receiver.

To Hon. Theodore E. Hancock, Attorney-General.

Petition on Application for Order Extending Powers of Temporary Receiver and Directing Sale of Property.

(Title.)

The petition of Howard Gillespy, respectfully shows to the court:

First. That he is the temporary receiver of the Sheffield Manufacturing Company of Saugerties, Ulster county, in the State of New York, having been duly appointed by an order of this court made in the above-entitled proceeding, at a Special Term thereof, held at the city hall, in the city of Albany, on the first day of April, one thousand eight hundred and ninety-five, and which said order was duly entered in the Ulster county clerk's office on the 2d day of April, one thousand eight hundred and ninety-five.

Second. That your petitioner has duly given the bond provided for in and by the terms of the said order so appointing him as receiver as aforesaid, which said bond was duly approved as to form, manner of execution and sufficiency by Mr. Justice Parker, on the second day of April, one thousand eight hundred and ninety-five, and which said bond was duly filed in the Ulster county clerk's office on the said second day of April, one thousand eight hundred and ninety-five.

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Third. That your petitioner has duly qualified and entered upon the discharge of his duties as such receiver as aforesaid.

Fourth. That by virtue of his appointment your petitioner has become possessed of no real estate, but did become possessed of a large amount of personal property, consisting of blank books of various forms, kinds and sizes; flat paper used in the preparation and manufacture of such blank books, leather, folded stock, envelopes, paste board boxes of various forms and sizes; writing pads and tablets of various sizes, kinds and weights; articles used in printing and for the preparation of covers for books; pads and tablets; packing boxes and materials used in their construction; fifty shares of the capital stock of the Barclay Fibre Company and sundry machinery and fixtures which are covered by a mortgage which has been foreclosed and is in judgment; various accounts receivable, sundry open accounts upon the ledgers of J. B. Sheffield & Son; leases covering the premises occupied by the company at Saugerties, New York, and their offices in New York; and an employe's liability policy in the Travelers' Insurance Company; sundry accounts called "suspense accounts," which are regarded of little or no value; books of the corporation and insurance policies covering the stock and property of said corporation.

Fifth. That in and by the order appointing your petitioner, he was authorized to continue operating the shops and works of said corporation to the extent that he might deem it wise, prudent and necessary for the purpose of preserving the assets of said corporation and the market-value of its property.

Sixth. That your petitioner, pursuant to the powers so delegated to him, has continued to operate the said works. That there are at least two hundred and fifty people in the employ of the said company, with a weekly pay roll of about fifteen hundred dollars. That the paper and book trade at the present time is exceptionally dull; that there is no prospect, as petitioner believes, of immediate improvement; that in petitioner's opinion the assets of the receiver would be materially depreciated by the continuation on the part of the receiver, of the manufacture of blank books and pads at the present time; that it would be unwise to shut down the works of the said company by reason of the fact that it would depreciate the value of its property in its entirety, because of the inability of your petitioner to supply the trade with the orders which are received almost daily for the filling in of odd numbers and sizes of blank books.

Seventh. That a judgment of foreclosure, as your petitioner is informed and believes, has been docketed in the office of the clerk of the county of Ulster, against all of the machinery owned by said corporation in an action in which Charles A. Spaulding, as trustee, for sundry bondholders, is plaintiff, and the said Sheffield Manufacturing Company is defendant.

Eighth. That your petitioner is informed and believes that the machinery is about to be advertised for sale at a very early date, and if so sold would leave him without the means of appliances of continuing the business, or compel him to rent the said machinery, provided the said arrangement could be made. That in addition to

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the uncertainty as to the result of said foreclosure sale, the rental for the machinery would prove an additional expense altogether, that it is probable that the business could not be carried on, certainly for any length of time in so uncertain a condition, excepting to the detriment of the stockholders and all persons interested in the affairs of said corporation, as creditors, bondholders or stockholders.

That as this petitioner is informed and believes, the committee appointed on behalf of a large majority of the stockholders, bondholders and creditors of said corporation, representing all but a small percentage thereof, is ready and prepared to purchase all the assets of said corporation at a fair price.

That it is the opinion and judgment of this petitioner that a better price for the property and assets of said corporation can be acquired by a sale of all the assets as herein prayed for at the present time and under existing circumstances.

Your petitioner, therefore, prays that he may be given the powers of a permanent receiver so as to sell the personal property above referred to, and that he may sell all the personal property in his hands at the earliest practicable moment, having due regard to the rules and practice of the court in the premises. And your petitioner will forever pray.

Dated Saugerties, N. Y., April 5th, 1895.

HOWARD GILLESPIE,
Petitioner.

Order Extending Powers of Temporary Receiver and Authorizing Receiver to Sell.

At a Special Term of the Supreme Court of the State of New York, held at the court house, in the city of Kingston, on the sixth day of April, 1895.

(Title.)

Upon reading and filing the petition for the appointment of the receiver and the order appointing him, also the petition of said temporary receiver, verified on the 5th day of April, 1895, which proposed order and a notice of motion for this time and place, with proof of the due service on Hon. Theodore E. Hancock, the attorney-general, and on motion of Edgar M. Haines, the attorney for said receiver, G. D. B. Hasbrouck, appearing for the attorney-general, it is ordered,

First. That said Howard Gillespie, the temporary receiver of the said Sheffield Manufacturing Company, be and he hereby is granted the power and authority for, and is subjected to the duties and liabilities of a permanent receiver.

Second. That the said receiver be and he hereby is authorized, empowered and directed to sell at public auction all the personal property coming into his hands as such receiver as aforesaid, including all accounts, bills receivable and accounts receivable.

Third. That before making said sale, said receiver give at least fourteen days' public notice of the time and place of said sale by

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posting notices thereof in at least three public places in the village of Saugerties, Ulster county, in the State of New York, where said personal property is located, and also by publishing notice thereof for two weeks in the Saugerties Post, a newspaper printed in the county where said property is located and where said sale is to be made.

Fourth. It is further ordered that the said receiver may accept in lieu of cash upon said sale, the voucher, receipt or acquittance of any creditor or any committee of trustees, of all or any of the creditors of said corporation, for such sum or sums as would be represented by the said creditors upon a distribution of the proceeds of said sale, ratably and proportionately among all of the creditors of said corporation, after deducting the costs, charges and expenses of said sale. The said receipt, voucher or acquittance to stand and be in lieu of a similar cash amount which would be distributed or be paid as a dividend to such creditor and the amount of such receipt, acquittance or voucher is to be charged to such creditor as a payment for the amount received by them.

Enter. ALTON B. PARKER,
J. S. C.

Precedent for Interlocutory Account.

NEW YORK SUPREME COURT — KINGS COUNTY.

PEOPLE OF THE STATE OF NEW YORK	}
<i>agst.</i>	
GRANITE STATE PROVIDENT ASSO- CIATION.	

*To the Special Term of the Supreme Court of the State of New York,
held in and for the county of Kings :*

I, Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, do hereby render the following account of my proceedings as temporary receiver of said association from the time of my appointment to October 1st, 1896:

By an order of this court, bearing date the 28th day of March, 1896, and filed in the office of the clerk of Montgomery county, on the 4th day of April, 1896, I was appointed temporary receiver of all the property, things in action and effects, real and personal, of said corporation, and of all the property held by it, with the usual powers and duties enjoyed and exercised by receivers according to the practice of this court and the statutes in such case made and provided.

It was provided by said order that before entering upon the duties of my trust I should execute and deliver, with sufficient sureties, a bond to the people of the State of New York in the penal sum of two hundred thousand (\$200,000) dollars, conditioned upon the faithful execution of my trust, and upon filing such bond, duly approved, I was authorized and directed to take possession of all the property, real and personal, of said corporation.

On the 10th day of April, 1896 I filed in the office of the clerk of

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the county of Montgomery my bond in the manner and form provided for in said order, the same having been duly approved upon notice to the attorney-general.

As soon as practicable after my qualification as temporary receiver, I availed myself of the provisions of law allowing this court to authorize me to more fully protect the property of said association, and that I applied for and obtained an order bearing date the 16th day of April, 1896, authorizing and directing the superintendent of banks to pay and deliver to me all money, funds, bonds and mortgages deposited with him, and that in pursuance and by virtue of said order the superintendent of banks did thereafter deliver to me bonds, mortgages and cash of the par or face value of one hundred thousand (\$100,000) dollars, and that I did also obtain various other orders, as is more particularly shown in the schedule hereafter following, marked "Schedule No. 59."

That by an order bearing date the 21st day of July, 1896, the venue or place of trial of the above-entitled action was changed from Montgomery to Kings county.

That at the time I qualified as receiver as aforesaid the books and evidences of property in this State were in the possession of David A. Taggart, Esq., the assignee or receiver appointed by the Supreme Court of the State of New Hampshire, but that I was able to obtain access to such books and to make copies of the same as far as they related to the property of the association in this State, and that I was also able to obtain the bonds, mortgages and other papers relating to the property and investments of the association in this State; that I have proceeded to collect all the moneys due said association as far as possible, and have deposited the moneys received by me and belonging to said association, in the bank of the Manhattan Company, New York city, in compliance with the terms of the order aforesaid.

Annexed to this account, and marked "General Statement, No. 1," is a summary statement of the assets of the Granite State Provident Association, as shown by my inventory heretofore filed.

This is followed by "General Statement, No. 2," showing the cash received and disbursed by me.

This again is followed by "General Statement, No. 3," showing the assets referred to in my inventory as reduced by collections and other causes.

This again is followed by "General Statement, No. 4," showing the liabilities of the association in this State at the time of my appointment as receiver.

This again is followed by "General Statement, No. 5," showing the present condition of the liabilities of the association in this State.

All the items referred to in the several general statements above mentioned are shown in detail by schedules, which said schedules are severally signed by me and made a part of this account.

Dated, New York, October 1, 1896.

All of which is respectfully submitted.

EDWIN E. DICKINSON,
(Annex schedule and verification.) Temporary Receiver.

Art. 6. Precedents Relating to Receivership of Corporations.

**Notice of Presentation of Interlocutory Account and Motion
for Order of Reference Thereon.**

NEW YORK SUPREME COURT — KINGS COUNTY.

PEOPLE OF THE STATE OF NEW YORK

*agst.*GRANITE STATE PROVIDENT ASSO-
CIATION.

Please take notice that in accordance with the law in that case made and provided, we shall on the 21st day of November, 1896, at 10:30 o'clock in the forenoon of that day, at a Special Term of the Supreme Court, to be held in the court-house in the city of Newburgh, N. Y., present the account of Edwin E. Dickinson, as temporary receiver of the Granite State Provident Association, exhibiting in detail the receipts of his trust and the expenses paid and incurred therein. And at the same time and place request that the same be passed upon by the court, or that a reference be had herein for the purpose of passing upon the same.

Dated, New York, October 1st, 1896.

LEXOW, MACKELLAR & WELLS,

Attorneys for Edwin E. Dickinson, Receiver, etc.

To Hon. Theodore E. Hancock,

Attorney-General of the State of New York.

Philip Carpenter, Esq.,

Atty. for Deft. Granite State Provident Association.

J. Newton Fiero, Esq.,

Attorney for David A. Taggart, etc.

American Surety Company,

Surety on Receiver's Bond.

Order of Reference as to Interlocutory Account.

At a Special Term of the Supreme Court of the State of New York, held at the court-house in the city of Newburgh, this 21st day of November, 1896.

Present — Hon. William D. Dickey, *Justice*.

PEOPLE OF THE STATE OF NEW YORK

*agst.*GRANITE STATE PROVIDENT ASSO-
CIATION.

Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, having presented to a Special Term of this court an account of the administration of his trust as temporary

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receiver of the said Granite State Provident Association, from the 28th day of March, 1896, the date of his appointment as such temporary receiver, to the 30th day of September, 1896, inclusive, and on reading and filing the said account, together with proof of notice of presentation thereof, and also proof of service of such account and a copy of this order upon the attorney-general of the State of New York; the American Surety Company, the surety on receiver's bond; Philip Carpenter, Esq., attorney for the defendant Granite State Provident Association, and J. Newton Fiero, Esq., attorney for David A. Taggart, etc., and also proof of the filing of said account in the office of the superintendent of banks of the State of New York, and in the office of the attorney-general of the State of New York, and after hearing C. W. Francis, Esq., deputy attorney-general of the State of New York, on behalf of the people of the State of New York, and T. Tileston Wells, Esq., on behalf of Edwin E. Dickinson, temporary receiver of the Granite State Provident Association,

Now, on motion of Lexow, Mackellar & Wells, attorneys for Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, it is

Ordered, That Walter N. Gill, Esq., counselor at law, be, and he hereby is, appointed referee to take and state the accounts of the temporary receiver herein, and to state and report to this court the amount properly payable to the attorneys and counsel for the said temporary receiver as expenses incurred for costs, fees and allowances for services duly rendered by them to the said temporary receiver and for disbursements made by them, and to ascertain and report the commissions properly payable to the temporary receiver for and on account of his services as stated in said accounts, and it is further

Ordered, That not less than two days' notice of the hearing before the referee be given to the attorney-general, and the attorneys for the other parties, and that the referee shall take such testimony as shall be presented by either party, and report his determination, together with the testimony so taken by him, to this court in writing with all convenient speed, and it is further

Ordered, That hearings before said referee may be held either in New York or Kings counties.

Enter in Kings county.

Report of Referee on Interlocutory Accounting by Receiver.

NEW YORK SUPREME COURT — KINGS COUNTY.

PEOPLE OF THE STATE OF NEW YORK

agst.

GRANITE STATE PROVIDENT ASSO-
CIATION.

To the Special Term of the Supreme Court of the State of New York:

I, Walter N. Gill, the referee duly appointed by an order of this court, bearing date the 21st day of November, 1896, and entered in the office of the clerk of the county of Kings, on the 23d day of

Art. 6. Precedents Relating to Receivership of Corporations.

November, 1896, to take and state the accounts of Edwin E. Dickinson, as temporary receiver of the Granite State Provident Association, and to state and report to this court the amount properly payable to the attorneys and counsel for the said temporary receiver, as expenses incurred for costs, fees and allowances for services duly rendered by them to the said temporary receiver, and for disbursements made by them, and to ascertain and report the commissions properly payable to the said temporary receiver for and on account of his services as stated in said accounts, do hereby respectfully report as follows:

First. That on the 27th day of November, 1896, the day appointed for the first hearing herein, Messrs. Lexow, Mackellar & Wells, attorneys for the temporary receiver, produced and filed with me a notice of said hearing, with proof of service of the same upon the attorney-general; Henry C. Wilcox, Esq., attorney for the American Surety Company, the surety on the receiver's bond; Philip Carpenter, Esq., attorney for the defendant the Granite State Provident Association; and J. Newton Fiero, Esq., attorney for David A. Taggart, Esq., assignee, etc., and that said notice, with admissions and proofs of service, is hereto annexed.

Second. That before proceeding to hear the testimony, I took and subscribed, in writing, the statutory oath as such referee, which is hereto annexed.

Third. That the plaintiffs appeared on the hearing before me by Clarence W. Francis, Esq., deputy attorney-general of the State of New York; the temporary receiver, by Messrs. Lexow, Mackellar & Wells (Messrs. Clarence Lexow, T. Tileston Wells and Louis B. Van Gaasbeek, of counsel); the defendant Granite State Provident Association, by Philip Carpenter, Esq. (Mr. Jonathan C. Ross, of counsel); and David A. Taggart, Esq., assignee, etc., by J. Newton Fiero, Esq.; and that there were no other appearances.

Fourth. That I have read and examined the accounts, vouchers, statements and orders, and have heard the proofs and arguments submitted by the respective parties and thereupon I do find and report as follows:

I. That on the 21st day of November, 1896, the said temporary receiver presented, and that thereafter and on the 23d day of November, 1896, filed in the office of the clerk of Kings county his accounts setting forth in detail all his acts and proceedings as such receiver and of the administration of his trust from the date of his appointment to the 30th day of September, 1896, inclusive.

II. That no objection or exceptions to the said account have been filed in the office of the clerk of the county of Kings as more fully appears from his certificate hereto annexed.

III. That said account was also produced before me and put in evidence, together with the original vouchers supporting and verifying the same.

IV. That on the 21st day of November, 1896, the said temporary receiver presented at a Special Term of the Supreme Court, and thereafter on the 23d day of November, 1896, filed in the office of the clerk of Kings county with and as a part of his said account, an

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itemized bill rendered to him by Messrs. Lexow, Mackellar & Wells, for services and disbursements made by them as attorneys and counsel for the said temporary receiver on matters pertaining to the receivership, during the period covered by the said temporary receiver's accounting and to the 30th day of September, 1896, inclusive, amounting to the sum of six thousand three hundred and eighty-eight dollars and eighteen cents (\$6,388.18). That said attorneys' bill and account was produced before me and put in evidence and three disinterested witnesses were examined in explanation and support thereof in addition to the testimony of Messrs. Wells, Mackellar and Lexow, and no testimony in opposition thereto was offered by any party to this proceeding.

V. That I have examined in detail the accounts, vouchers and checks, and that the same as set forth is a true and correct account of his acts and proceedings as such temporary receiver from the date of his appointment to the 30th day of September, 1896, inclusive.

VI. The following is a summary statement of the account of said temporary receiver, viz.:

The receiver should be charged as follows:

Property shown in the last column of General Statement No. III	\$385, 448 21
Cash received as shown by General State- ment No. II.....	101, 929 38
	<u>\$487, 377 59</u>

The receiver should be credited as follows :

Cash disbursed as per General Statement No. II.....	\$4, 374 24
Property settled or closed out as per sec- ond column of General Statement No. III....	116, 100 38
Property being foreclosed as per third column of General Statement No. III.	40, 799 72
Balance in bank as per General Statement No. II.....	97, 050 38
Balance in cash drawer as per General Statement No. II.....	6 14
Balance in hands of agents as per General Statement No. II	498 62
Assets on hand as per first column of General Statement No. III.....	228, 548 11
	<u>\$487, 377 59</u>

VII. That the temporary receiver has during the period covered by his accounting paid no dividends to creditors or stockholders.

VIII. That to properly administer his trust, said temporary receiver was obliged to employ competent counsel to advise and assist him in the matters pertaining to the administration of his said trust; that the temporary receiver retained Messrs. Lexow, Mackellar & Wells to act for him in that capacity, and that they rendered valuable services to the said temporary receiver, which are

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more particularly shown in their bill, filed with and being a part of the account of the temporary receiver, and in the testimony of the witnesses who were examined before me.

IX. That in my judgment the said services are reasonably and fairly worth the amount stated in said bill, viz.: the sum of five thousand two hundred and ninety dollars (\$5,290). Between the date of the appointment of the said temporary receiver and the 30th day of September, 1896, inclusive, the said attorneys and counsel incurred necessary expenses and made necessary disbursements, which are set forth in their bill and which have been proven before me, amounting to the sum of one thousand and ninety-eight dollars and eighteen cents (\$1,098.18), both of said sums amounting in all to six thousand three hundred and eighty-eight dollars and eighteen cents (\$6,388.18), are in my opinion properly payable to Messrs. Lexow, Mackellar & Wells.

X. That the said temporary receiver has not been paid any fees or any commissions for any services, and that the commissions and fees now properly payable to him based on sums actually received and paid out by him during the period covered by this account as fixed by § 2 of chapter 378 of the Laws of 1888, as amended by chapter 275 of the Laws of 1886, are as follows:

On moneys received,	
\$100,000.00 at two and one-half per cent.....	\$2,500 00
\$1,929.38 at one and one-fourth per cent.....	24 12
On moneys paid out,	
\$4,874.24 at two and one-half per cent.....	109 36
Making in all.....	<u>\$2,633 48</u>

which said sum is now properly payable to him.

XI. That the testimony taken before me under the order of reference herein consists of 235 typewritten pages, and is submitted with this my report.

Dated, New York, December, 23, 1896.

WALTER N. GILL,

Referee.

Order Confirming Report of Referee on Interlocutory Accounting.

At a Special Term of the Supreme Court of the State of New York, held at Supreme Court chambers in the city of Newburgh, this 2d day of January, 1897.

Present — Hon. Michael H. Hirschberg, *Justice*.

PEOPLE OF THE STATE OF NEW YORK

agst.

GRANITE STATE PROVIDENT ASSOCIATION.

Edwin E. Dickinson, temporary receiver of the defendant Granite State Provident Association, heretofore appointed in this action,

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having filed his account from the day of his appointment to September 30th, 1896, inclusive, and having then and there applied to this court for instructions in the administration of his trust, and an order having been entered in this action on the 23d day of November, 1896, appointing Walter N. Gill, Esq., referee to take and state the accounts of the said temporary receiver, and to state and report to this court the amount properly payable to the attorneys and counsel for the said temporary receiver as expenses incurred for costs, fees and allowances for services rendered by them to the said temporary receiver, and for disbursements made by them, and to ascertain and report the commissions properly payable to the said temporary receiver for and on account of his services as stated in said accounts, and said reference having proceeded before the referee named in such order, and testimony having been taken, and said reference having been attended by Clarence W. Francis, Esq., deputy attorney-general of the State of New York, on behalf of the people of the State of New York; by Messrs. Lexow, Mackellar & Wells, on behalf of Edwin E. Dickinson, Esq., temporary receiver as aforesaid; by Philip Carpenter, Esq., attorney for defendant Granite State Provident Association, and by J. Newton Fiero, Esq., attorney for David A. Taggart, Esq., assignee, etc., and said referee having made his report in writing, and said report having been duly filed in the office of the clerk of Kings county, and a copy of said report, together with notice of filing thereof, having been served upon the attorney-general of the State of New York; the attorney for the American Surety Company, the surety on the temporary receiver's bond; Philip Carpenter, Esq., attorney for the defendant Granite State Provident Association, and J. Newton Fiero, Esq., attorney for David A. Taggart, Esq., assignee, etc., and notice of motion to confirm said referee's report and said temporary receiver's accounts having been served on the attorney-general and the other attorneys above named, together with a copy of the proposed order to confirm said referee's report, and on proof of such service, and after hearing

_____, Esq., on behalf of the people of the State of New York, and T. Tileston Wells, Esq., on behalf of the temporary receiver of the Granite State Provident Association,

Now, on motion of Lexow, Mackellar & Wells, attorneys for Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, it is

Ordered, That the report of Walter N. Gill, Esq., referee herein, appointed by order of this court, bearing date the 21st day of November, 1896, and entered in the office of the clerk of Kings county on the 23d day of November, 1896, which said report is submitted herewith, be, and the same hereby is in all things confirmed; and it is further

Ordered, That Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, be, and he hereby is, authorized and directed to retain out of the moneys in his hands two thousand six hundred and thirty-three $\frac{48}{100}$ dollars (\$2,633.48), for his fees and commissions from the date of his appointment to the 30th day of September, 1896, inclusive, as found by said referee to be such fees and commissions; and it is further

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Ordered, That said Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, be, and he hereby is, authorized and directed to pay to Messrs. Lexow, Mackellar & Wells, for their services as attorneys and counsel during the period covered by the bill rendered to him and made a part of the account hereinabove referred to, the sum of five thousand two hundred and ninety dollars (\$5,290), together with the sum of one thousand and ninety-eight $\frac{18}{100}$ dollars (\$1,098.18) for their disbursements, making in all six thousand three hundred and eighty-eight $\frac{18}{100}$ dollars (\$6,388.18), as found by said referee to be proper charges for their services and disbursements and proper expenses incurred by said temporary receiver in the administration of his trust; and it is further

Ordered, That said Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, be, and he hereby is, authorized and directed to pay to Walter N. Gill, Esq., for his fees as referee herein, the sum of _____ dollars; and it is further

Ordered, That said Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, be, and he hereby is, authorized and directed to pay to Miss E. W. Munn the sum of two hundred and eleven $\frac{50}{100}$ dollars (\$211.50), for her services as stenographer in the reference before Walter N. Gill, Esq., hereinbefore mentioned; and it is further

Ordered, That Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, be, and he hereby is, authorized and directed to pay to Messrs. Lexow, Mackellar & Wells the further sum of _____ dollars for an additional allowance on the accounting aforesaid.

Enter in Kings county.

Petition by Receiver for Instructions as to Sale of Real Estate.

NEW YORK SUPREME COURT — KINGS COUNTY.

PEOPLE OF THE STATE OF NEW YORK

agst.

GRANITE STATE PROVIDENT ASSOCIATION.

To the Supreme Court of the State of New York:

The petition of Edwin E. Dickinson respectfully shows to this honorable court:

First. That heretofore and on or about the 28th day of March, 1896, in the above-entitled action, an order was duly granted and thereafter entered in the office of the clerk of the county of Montgomery, appointing your petitioner temporary receiver of the above-named defendant Granite State Provident Association, and providing, among other things, that upon the filing and approval of a bond in the penal sum of two hundred thousand dollars (\$200,000), your

Art. 6. Precedents Relating to Receivership of Corporations.

petitioner should take possession of all the assets of said defendant in the State of New York.

Second. That thereafter and on the 6th day of April, 1896, your petitioner duly executed and delivered a bond, with the American Surety Company as surety, and the same, upon due notice to the attorney-general, was duly approved by a justice of this court, and thereafter and on the 10th day of April, 1896, filed in the office of the clerk of the county of Montgomery.

Third. That thereafter and on the 2d day of July, 1896, an order was made and granted in the above-entitled action whereby the venue or place of trial of such action was changed from the county of Montgomery to the county of Kings, and that said order was thereafter and on the same day entered in the office of the clerk of Montgomery county.

Fourth. And your petitioner further shows that the above-named defendant, Granite State Provident Association, is a foreign corporation organized and existing under and pursuant to the laws of the State of New Hampshire, and formerly engaged in the business of a national building and loan association.

Fifth. And your petitioner further shows that among the assets which came into your petitioner's hands, as receiver as aforesaid, was a piece of real estate in the village of Flushing, Queens county, New York, and more particularly described as follows: (Insert description.)

Sixth. And your petitioner further shows that such property was subject to a first mortgage for three thousand five hundred dollars (\$3,500).

Seventh. And your petitioner further shows that heretofore and on the 7th day of July, 1896, he obtained an order of this court authorizing and empowering him to sell and dispose of the real estate vested in him as receiver and formerly belonging to the Granite State Provident Association, which said order is hereto annexed and marked Exhibit A.

Eighth. And your petitioner further shows, that under and by virtue of such authority, he did on or about the 27th day of August, 1896, agree to sell the premises in question to one Edward Richardson, for the sum of four thousand dollars (\$4,000), to be paid as follows:

At the time of executing the contract, in cash.....	\$100 00
By the purchaser assuming payment of a mortgage for \$3,500.....	\$3,500 00
At the time of the delivery of the deed to the aforesaid premises.....	400 00
Total.....	<u>\$4,000 00</u>

and it was furthermore agreed that the said purchaser should pay any and all assessments for the year of 1896 which were then or might thereafter become due. And he furthermore agreed to assume and pay any and all fees and charges or commissions of any agent or agents, broker or brokers who might have negotiated such sale.

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Ninth. And your petitioner further shows that he has received the part payment of one hundred dollars (\$100) above mentioned, and is ready and willing to deliver the deed to the premises in question, but that the said Edward Richardson, the proposed purchaser, is unwilling to take title on the ground that the order hereinbefore referred to, a copy of which is hereto annexed and marked Exhibit A as aforesaid, does not grant unto your petitioner sufficient power to sell and dispose of the property in question and give a good and marketable title.

Wherefore, your petitioner prays for the advice and directions of this honorable court in the matters hereinabove set forth, and that he may have leave to carry out the sale above mentioned and for that purpose to execute any and all necessary deed or deeds as he may be advised by counsel learned in law are right and proper.

That no other or former application has been made for this or any similar order or relief.

And your petitioner as in duty bound will ever pray, etc.

EDWIN E. DICKINSON,

LEXOW, MACKELLAR & WELLS,

Temporary Receiver.

Attorneys for Receiver.

Order Authorizing Receiver to Sell Property.

At a Special Term of the Supreme Court of the State of New York, held in the county court-house in the city of Brooklyn, this 4th day of January, 1897.

Present — Hon. William D. Dickey, *Justice*.

PEOPLE OF THE STATE OF NEW YORK

agst.

GRANITE STATE PROVIDENT ASSOCIATION.

On reading and filing the notice of motion herein, and the petition of Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, thereto annexed, verified the 31st day of December, 1896, and proof of service of such notice of motion, petition and the proposed order to be entered thereon, on the attorney-general of the State of New York, and the attorney for the defendant, and after hearing T. Tileston Wells, Esq., of counsel for the receiver, on behalf of the motion, and on behalf of the attorney-general of the State of New York,

Now, on motion of Lexow, Mackellar & Wells, attorneys for Edwin E. Dickinson, temporary receiver of the defendant Granite State Provident Association, it is

Ordered, That Edwin E. Dickinson, temporary receiver of the Granite State Provident Association, be, and he hereby is, authorized and empowered to sell to E. Richardson the premises situate at Flushing, Queens county, more particularly described in his petition, whereon this order is made, verified the 31st day of December, 1896,

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for the sum of four thousand dollars (\$4,000), to be paid in the manner more particularly shown in the petition aforesaid, and for that purpose to execute any and all necessary deed or deeds of the premises in question as may be proper to convey title to said E. Richardson.

Enter in Kings county.

Precedents in Proceedings for Proof of Claims.

SUPREME COURT — QUEENS COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF,	}
<i>agst.</i>	
THE MUTUAL BREWING COMPANY, DEFENDANT.	

Please take notice, that upon all the papers and proceedings in this action, and the judgment herein, and also upon the annexed petition of Edward Duffy, the permanent receiver of the Mutual Brewing Company, sworn to July 23d, 1896, we shall move this court, at a Special Term thereof, to be held at the county court house in the city of Brooklyn, county of Kings and State of New York, on the 28th day of July, 1896, at 10 A. M., for an order, in the form of an order of which a copy is hereto annexed, requiring all the creditors of the corporation mentioned to exhibit and prove their claims and thereby make themselves parties to this action, and requiring publication of notice of such order, as provided for in § 1807 of the Code of Civil Procedure, or for such other or further relief as to the court may seem meet.

Dated, New York, July 23d, 1896 .

Yours, etc.,

DURNIN & YATES,

Attorneys for the Receiver

To Hon. Theodore E. Hancock, Attorney-General.

SUPREME COURT — QUEENS COUNTY.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF,	}
<i>agst.</i>	
THE MUTUAL BREWING COMPANY, DEFENDANT.	

To the Supreme Court of the State of New York:

The petition of Edward Duffy, as permanent receiver, under the judgment in this action entered on the 19th day of May, 1896, respectfully shows to this court:

First. That your petitioner says that this action was commenced by the People of the State of New York, to secure a judgment for the dissolution of the defendant, The Mutual Brewing Company, and for a distribution of its assets among its creditors, and that on or

 Art. 6. Precedents Relating to Receivership of Corporations.

about the 19th day of May, 1896, judgment was entered in this action which recited the service of the summons and complaint, and upon motion of counsel for plaintiff, it was adjudged and decreed, among other things, that The Mutual Brewing Company be, and it was thereby dissolved and its corporate rights, privileges and franchises forfeited.

And it further decreed that a fair and just distribution of its property and of the proceeds thereof be made to its fair and honest creditors in the order and in the proportion provided by law.

Second. That by said judgment in this action, your petitioner, who had previously been appointed temporary receiver herein, was continued as such receiver of all the property and effects, real and personal, of said corporation, and was made permanent receiver thereof with the usual powers and duties enjoyed and exercised by receivers according to the practice of this court and of the statute in such cases made and provided.

And it was also adjudged and decreed, that the receiver might make further application to the court as he might be advised for his instruction in the management and conduct of his trust.

Third. Your petitioner further says that there has not been any order in this action requiring the creditors of the said corporation or of your petitioner, as such receiver, to exhibit and prove their claims, or to make themselves parties to this action, as required by § 1807 of the Code of Civil Procedure.

Wherefore, your petitioner prays that an order be made herein requiring all the creditors of the said corporation to exhibit and prove their claims and thereby make themselves parties to this action in such a manner and in such a reasonable time, not less than six months from the time of the first publication of the order, as the court may direct, and providing that the creditors who make default in so doing shall be precluded from all benefit of the judgment and from any distribution which may be made thereunder, excepting as provided by law, and that notice of such order be directed to be given by publication as required by § 1807 of the Code of Civil Procedure; and your petitioner says that there has not been any previous application for this order now asked for.

EDWARD DUFFY.

At a Special Term of the Supreme Court of the State of New York, held in and for the county of Kings in the city of Brooklyn, State of New York, on the 28th day of July, 1896.

Present — Hon. N. H. Clement, *Justice*.

THE PEOPLE OF THE STATE OF NEW
YORK, PLAINTIFF,

agst.

THE MUTUAL BREWING COMPANY,
DEFENDANT.

A motion having been made on behalf of Edward Duffy, the receiver of the Mutual Brewing Company herein, for an order re-

Art. 6. Precedents Relating to Receivership of Corporations.

quiring all the creditors of said corporation to exhibit and prove their claims and thereby make themselves parties to this action, and requiring notice of such order, as provided for in section 1807 of the Code of Civil Procedure, and for such other and further relief as to the court may seem meet, Now, after hearing Durnin & Yates, upon behalf of said receiver, in support of the motion, and upon due proof of service of the within petition, notice of motion and proposed order herein upon the attorney-general,

Now, upon motion of Durnin & Yates, attorneys for said receiver, it is

Ordered, that all the creditors of The Mutual Brewing Company exhibit and prove their claims against the said Mutual Brewing Company or against the said receiver, and thereby make themselves parties to this action, and that they so exhibit and prove such claims with Edward Duffy, the receiver of the said corporation, at his place of transacting business, at the office of Durnin & Yates, his attorneys, No. 20 Nassau street, in the city of New York, within six months from the 14th day of August, 1896, and

It is further ordered, that the creditors who make default in so doing shall be precluded from all benefit of the judgment herein, and from any distribution which may be made thereunder, except as provided in section 1807 of the Code of Civil Procedure, and

It is further ordered, that notice of this order be given by publication in the following papers, to wit: In the Queens County Review, published at Freeport, Long Island, and in the Flushing Journal, published at Flushing, and for the following length of time, to wit: Once a week for six weeks.

It is further ordered, that all claims be proven by the presentation of vouchers accompanied by the affidavit of the party or one of the parties interested, or the agent of said party or parties having knowledge of the facts that the whole amount of the debt shown in said vouchers is justly due from the corporation aforesaid, or from said receiver to the corporation named in the voucher over and above all set-offs and counterclaims, with liberty to said receiver to contest any of the claims so proven as he may be advised, and that the said receiver may apply, if necessary, to the court for instructions in regard to any of the claims that may be contested.

Enter.

N. H. C.
Justice.

Notice to Creditors.

SUPREME COURT — QUEENS COUNTY.

THE PEOPLE OF THE STATE OF NEW	}
YORK, PLAINTIFF,	
<i>agst.</i>	
THE MUTUAL BREWING COMPANY,	
DEFENDANT,	

In pursuance of an order duly made in the above-entitled action by Hon. N. H. Clement, one of the justices of said court, on the 28th

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day of July, 1896, notice is hereby given to all creditors of the said corporation to wit: The Mutual Brewing Company, and of said Edward Duffy as receiver of said corporation, that they are hereby required to prove their claims with Edward Duffy, receiver of said corporation, at his place of transacting business, at the office of Durnin & Yates, his attorneys, No. 20 Nassau street, in the city of New York, within six months from the 14th day of August, 1896; and that all creditors who make default in so doing shall be precluded from all benefit of the judgment herein, and from any distribution which may be made thereunder, except as provided in section 1807 of the Code of Civil Procedure, and that all claims be proven by presentation of vouchers accompanied by an affidavit of the party or of one of the parties interested, or an agent of said party or parties having knowledge of the facts that the whole amount of debt shown in said vouchers is justly due from the corporation aforesaid or from said receiver to the creditor named in the voucher over and above all set-offs and counterclaims, with liberty to said receiver to contest any of the claims so proven as he may be advised, and that said receiver will apply, if necessary, to the court for instructions in regard to any of the claims that may be contested.

Dated, New York, July 31st, 1896.

DURNIN & YATES,
Attorneys for Receiver,
20 Nassau street, New York City

EDWARD DUFFY, Receiver.

Precedent for Notice by Receiver to Persons Indebted to the Corporation and to Creditors.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW
YORK

agst.

THE HUDSON VALLEY KNITTING
COMPANY.

Notice is hereby given by the undersigned, Theodore F. Hamilton, receiver, etc., of the above-named defendant, the Hudson Valley Knitting Company, that he has been duly appointed the permanent receiver of said defendant, and has duly qualified as such and entered upon the performance of his duties, and that, pursuant to law, said receiver requires:

1. All persons indebted to said defendant, the Hudson Valley Knitting Company, to render an account of all debts and sums of money owing by them, respectively, to said company, or to the receiver of said company, at the office of Edgar T. Brackett, in the town hall, in the village of Saratoga Springs, N. Y. (the place where

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said receiver transacts his business as such), by the 15th day of January, 1897, and to pay the same.

2. All persons having in their possession any property or effects of such defendant, the Hudson Valley Knitting Company, to deliver the same to the undersigned, such receiver, by the said 15th day of January, 1897.

3. All the creditors of such debtor, the defendant, the Hudson Valley Knitting Company, to deliver their respective accounts and demands to the undersigned said receiver, at his said place of doing business, the said office of Edgar T. Brackett, in the town hall in the village of Saratoga Springs, N. Y., by the 15th day of January, 1897.

4. All persons holding any open or subsisting contract of such corporation, to present the same in writing, and in detail, to said receiver at the said office of Edgar T. Brackett, in the town hall, in the village of Saratoga Springs, N. Y., on the said 15th day of January, 1897.

Dated, November 23, 1896.

THEODORE F. HAMILTON,

Receiver of the Property of the Hudson
Valley Knitting Company.

EDGAR T. BRACKETT,

Attorney for Receiver.

Notice of Motion on Application for Final Settlement of Permanent Receiver's Accounts.

(Title.)

Sir:

Please take notice that a full and accurate account of all the proceedings of Howard Gillespy, as receiver of the above named corporation, on oath, will be presented to the Supreme Court of the State of New York, at a Special Term thereof, to be held at the city of Kingston, on the 21st day of December, 1895, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and a motion will then and there be made that the same be allowed and be decreed to be final and conclusive upon all the creditors of said corporation, and upon all the persons who may have claims against it, upon any open or subsisting engagement, and upon all of the stockholders of such corporation, and that said receiver be authorized to pay a final dividend, and upon proof of the payment thereof that he be discharged and his bond vacated, and for such other or further order as to the court may seem proper.

Dated Albany, N. Y., December 17th, 1895.

EDGAR M. HAINES,

Attorney for Receiver.

To Hon. T. E. Hancock, Attorney-General.

Art. 6. Precedents Relating to Receivership of Corporations.

Account of Receiver, Including Copy Notice to Present Claims and Copy Notice of Presentation of Account.

(Title.)

To the Supreme Court:

I, Howard Gillespy, of Saugerties, county of Ulster and State of New York, do hereby respectfully render the following account of all my proceedings as temporary and permanent receiver of the above-named corporation:

I. That I was duly appointed temporary receiver of the above-named corporation by an order of this court made at a Special Term of the Supreme Court, held at the city hall, in the city of Albany, on the 1st day of April, 1895, and which was duly entered in the Ulster county clerk's office on the 2d day of April, 1895.

II. That in accordance with the provisions of said order, I duly filed my bond in said Ulster county clerk's office, on the said 2d day of April, 1895, duly approved by Mr. Justice Parker.

III. That in and by the order appointing me receiver as aforesaid, I was authorized to continue operating the shops and works of the corporation to the extent that I deemed it wise, prudent and necessary for the purpose of preserving the assets of the corporation and the market-value of its property, and for such other purposes as I might deem it necessary.

IV. That in and by an order made at a Special Term of this court held on the 6th day of April, 1895, at the court house, in the city of Kingston, the power and authority of a permanent receiver was granted to me, and in and by the terms of said order I was authorized, empowered and directed to sell at public auction all personal property coming into my hands as such receiver, including all accounts, bills receivable and accounts receivable, and in and by the terms of said order I was also authorized to accept in lieu of cash upon said sale, the voucher, receipt or acquittance of a creditors' committee for such sum or sums as would be represented by said creditors' committee upon a distribution of the proceeds of such sale, ratably and proportionately made among all the creditors of said corporation; that the said receipt, voucher or acquittance was to stand in lieu of cash.

V. That pursuant to the terms of said order, I advertised said property for sale, and on the 24th day of April, 1895, I sold the same to William F. Russell, Edward C. Rogers, Charles A. Schultz, John G. Myers, Oscar S. Greenleaf, Robert A. Snyder and Daniel Lamb, as a committee for sundry bond and certificate holders of the Sheffield Manufacturing Company, for the sum of \$180,000, with the exception of a lot of worthless accounts heretofore belonging to J. B. Sheffield & Son, and amounting to fifty-seven thousand seven hundred and thirty-six dollars and fifty-seven cents (\$57,736.57), which were sold to William F. Russell for one dollar, and which had no market value.

VI. That I duly reported said sale to this court, and said report was by an order of this court duly made at a Special Term thereof,

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on the 25th day of June, 1895, and the said sale was in all things confirmed, and said order was entered in the Ulster county clerk's office on the 27th day of June, 1895.

VII. (Recite judgment and appointment as permanent receiver).

VIII. That in accordance with the provisions of said order, I duly filed my bond as permanent receiver of said corporation on the 23d day of August, 1895, in the Ulster county clerk's office.

IX. That immediately upon my appointment as such receiver of the above-named corporation I gave notice of such appointment as follows, viz:

(Title.)

NOTICE.

I, Howard Gillespy, of Saugerties, Ulster county, in the State of New York, do hereby give notice that I was appointed the permanent receiver of the corporation, The Sheffield Manufacturing Company, by an order of and at a Special Term of the Supreme Court, held at the city hall, in the city of Albany, on the 30th day of July, 1895, which order was entered in the office of the clerk of the county of Ulster on the 31st day of July, 1895, and that I have duly qualified as such receiver.

That by said order, the said corporation was dissolved and I, the said permanent receiver, do hereby give further notice, pursuant to the statute in such cases made and provided, requiring:

I. All persons indebted to the said corporation, The Sheffield Manufacturing Company, to render on or before the 16th day of October, 1895, an account of all debts and sums of money owing by them, respectively, to me, the permanent receiver of said corporation, and to pay the same at my office, in the village of Saugerties, county of Ulster and State of New York.

II. All persons having in their possession any property or effects of said corporation, to deliver the same to me, the permanent receiver of said corporation, on or before the 16th day of October, 1895, at my office aforesaid.

III. All the creditors of said corporation to deliver their respective accounts and demands against said corporation, to me, the permanent receiver of said corporation, on or before the 16th day of October, 1895, at my office aforesaid.

IV. All persons holding any open or subsisting contract of said corporation are required to present the same in writing and in detail to me, the permanent receiver of said corporation, on or before the 16th day of October, 1895, at my office aforesaid.

Dated, Saugerties, N. Y., August 29th, 1895.

HOWARD GILLESPY,

Permanent Receiver of the Sheffield Manufacturing
Company, Saugerties, Ulster County, New York.

by printing such notice once a week for three weeks in two newspapers within the county in which the corporation has its principal office of business, to wit: The Saugerties Post, published in the village of Saugerties, and in the Kingston Daily Leader, published

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in the city of Kingston, in said county, as appears by the affidavits of publication hereto annexed and marked "X" and "Y."

X. Schedules "1" and "2," hereto annexed, contain a full, accurate and true account of all moneys and property received or collected by me or with which I am chargeable.

XI. Schedules "3" and "4" hereto annexed, contain a full, accurate and true account of all discounts allowed by me, the wages of employees and salaries paid by me and expenses incurred by me in the conduct of the business under the authority of the court to continue operating the shops and works of said corporation.

XII. Schedule "5" hereto annexed, contains a statement of the balance of moneys in my hands and also shows the sum for which I hold the voucher of the stockholders or creditors's committee for part of the purchase price of the property aforesaid, pursuant to the order of the court.

XIII. That a notice for the presentation of my account as receiver of the above named corporation, a copy of which is as follows, viz:

Notice to the creditors and all persons interested in the Sheffield Manufacturing Company, of Saugerties, Ulster county, in the State of New York.

Take notice, that a full and accurate account of all the proceedings of the receiver of the above-named corporation, on oath, will be presented to the Supreme Court of the State of New York, at a Special Term thereof, to be held in the city of Kingston, on the 21st day of December, 1895, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, and a motion will then and there be made that the same be allowed and decreed to be final and conclusive upon all the creditors of said corporation, and upon all persons who may have claims against it, upon any open or subsisting engagement, and upon all the stockholders of such corporation, and that said receiver be discharged and his bond vacated.

Dated, Saugerties, N. Y., November 23rd, 1895.

HOWARD GILLESPIE,

Receiver of the Sheffield Manufacturing Company.

was duly published as prescribed by law, by printing such notice at least once a week for three successive weeks in the Saugerties Post and also in the Saugerties Telegraph and the Kingston Daily Leader, being newspapers published in the county in which the principal office of said corporation is located; and the said publication in the Saugerties Telegraph being made in lieu of the publication in the State paper; that the affidavits of publication of said last-mentioned notice are hereto annexed and marked, respectively, "L," "M" and "N."

XIV. That no money, property or effects, other than stated in said schedules, have come into my hands or possession; and that no appearances by any attorneys have been received by me or served on me.

XV. That no accounts or demands against said corporation, or any open or subsisting contracts with said corporation, have been

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delivered or presented to me, except as hereinafter stated; that the only creditors of said corporation are the stockholders, and most of them are represented by the stockholders or creditors' committee aforesaid.

XVI. Schedule "6," hereto annexed, contains the name and residence of each certificate-holder represented and those not represented by the committee, the amount due him and the amount of certificates represented by the stockholders or creditors' committee, and list of certificate-holders who have filed their certificates with the undersigned.

XVII. Said schedule also shows the amount of a judgment of deficiency against said corporation, upon the bonds issued by it upon the foreclosure of a mortgage upon this property and in favor of John W. Searing, as referee, in behalf of said bondholders.

XVIII. I know of no creditors interested in the assets of said corporation other than said certificate-holders and said John W. Searing, as referee, in behalf of the bondholders, upon the deficiency judgment aforesaid, and the said stockholders or creditors' committee, representing all of the certificate-holders of said corporation, except those whose names appear in the schedule as aforesaid, and who have not deposited their stock with said committee.

All of which is respectfully submitted.

Dated Saugerties, N. Y., December 21st, 1895.

H. GILLESPIE,

(Schedules to be attached.)

Receiver.

Order Appointing Referee to Examine and Report upon Receiver's Accounts.

At a Special Term of the Supreme Court of the State of New York, held at the court house in the city of Kingston, on the 21st day of December, 1895.

Present — Hon. A. B. Parker, *Justice*.

(Title.)

The receiver of the above-named corporation, Howard Gillespie, of Saugerties, Ulster county, in the State of New York, having at this date and term duly presented a full and accurate account of all his proceedings under oath,

Now, on reading and filing said account and also proof of the due publication of the notice of said presentation as required by law, and of the service of such notice, and of the proposed order of the attorney-general; and on motion of Edgar M. Haines, the attorney for the receiver; it is ordered that said account be, and the same hereby is referred to Henry A. Peckham, Esq., of the city of Albany, New York, attorney and counselor at law, to examine the same and report thereon with all convenient speed; that said referee be authorized to sit in Albany county.

Enter. ALTON B. PARKER.

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Order Settling Receiver's Accounts.

At a Special Term of the Supreme Court of the State of New York, held at the city hall, in the city of Albany, on the 7th day of April, 1896.

Present — Hon. Alden Chester, *Justice*.

(Title.)

Upon reading and filing the receiver's accounts of proceedings herein, and the exhibits and vouchers accompanying the same, and the order of this court referring said accounts to Henry A. Peckham, Esq., as referee, made at a Special Term of this court, held at the court house, in the city of Kingston, on the 21st day of December, 1895; and after reading and filing the report of said referee, dated the 31st day of March, 1896, and the schedules, exhibits and vouchers accompanying the same, and upon proof of the due service of a copy of said report and papers accompanying the same, with a notice of motion for the granting of this order for this time and place upon Hon. T. E. Hancock, attorney-general of this State; and after hearing Edgar M. Haines, Esq., the attorney, and Rosendale & Hessberg of counsel for said receiver; F. M. Parsons, deputy attorney-general, appearing and consenting thereto, it is ordered,

I. That the report of Henry A. Peckham, Esq., dated the 31st day of March, 1896, the referee duly appointed herein, by an order made at a Special Term of the Supreme Court, held at the court house in the city of Kingston, on the 21st day of December, 1895, be and the same hereby is in all respects ratified, approved and confirmed.

II. It is further ordered that the account of all the proceedings of Howard Gillespy, Esq., as temporary and permanent receiver of the Sheffield Manufacturing Company aforesaid, be and the same hereby are in all things allowed and decreed to be final and conclusive upon all the creditors of said corporation, and upon all persons who have or had claims against it, upon any open or subsisting engagement, and upon all the stockholders of said corporation.

III. Said receiver is hereby ordered, directed and empowered to pay a first and final dividend of $22\frac{53}{100}$ per centum to the creditors of said corporation, and that said dividend be paid to the persons and in the amounts set forth in a schedule hereto attached and marked "A," and forming a part of this order.

IV. It is further ordered that if the cash in hands of said receiver be insufficient to pay the dividend in full to John W. Searing, Esq., as referee upon the judgment of deficiency recovered against the corporation aforesaid, and set forth in the schedule attached to the referee's report, that said receiver is hereby ordered, directed and empowered to apportion the amount represented by the voucher, taken by him from the re-organization or creditor's committee, and in said referee's report referred to between himself as receiver and said John W. Searing, Esq., as referee, in the manner and in the amounts set forth in said schedule "A," hereto annexed and forming a part of this order.

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V. It is further ordered that said dividend so declared as aforesaid, be paid to the said creditors of said corporation, only upon their giving said receiver a proper voucher therefor, and upon their surrendering to said receiver any certificates of indebtedness issued by the said corporation aforesaid, and which may be held by the creditors of said corporation, or either or any of them.

VI. It is further ordered that if any creditor should refuse to give the voucher herein provided for, or refuse to surrender the certificate so held by him, or the whereabouts of said creditor cannot be learned, or upon the failure of any of the creditors to comply with the terms and provisions of this order, that said receiver be and he hereby is directed to deposit the dividend due such creditor with the county treasurer of the county of Ulster, subject to the further order of the court, and that he take the voucher of such county treasurer therefor.

VII. It is further ordered that said receiver file a further report with the clerk of the county of Ulster, showing his compliance with the terms and provisions of this order, and that upon the filing of said report, and the vouchers herein directed to be obtained, the said Howard Gillespy, as the temporary receiver, and as the permanent receiver of the Sheffield Manufacturing Company, shall from thenceforth be and he hereby is finally, duly and forever discharged as receiver; and that the bond given by said receiver on his appointment as temporary receiver, and the bond given upon his appointment as permanent receiver, and each of them, shall from thenceforth be vacated, canceled and discharged, and that all the sureties upon said bonds, and each of them, and their and each of their heirs, executors and administrators shall from thenceforth be and they hereby are fully and finally released, discharged and acquitted of any and all further liability arising from or by reason of said bonds, or any matter or thing in connection therewith or arising therefrom.

The clerk of Ulster county will enter.

ALDEN CHESTER,
Jus. Sup. Ct.

Receiver's Final Report.

(Title.)

To the Supreme Court:

The undersigned, the permanent receiver of the Sheffield Manufacturing Company, of Saugerties, Ulster county, in the State of New York, respectfully reports:

That pursuant to the final order passing my accounts as such receiver, which said order was made at a Special Term of the Supreme Court of the State of New York, held at the city hall, in the city of Albany, on the 7th day of April, 1896, and which was duly entered in the Ulster county clerk's office, on the 8th day of April, 1896, I proceeded to make a full and final distribution of all moneys and assets in my hands as such receiver as aforesaid.

That I paid to Edgar M. Haines, Esq., the attorney for the petitioners, the costs, allowances and disbursements, and for services rendered, amounting to one thousand (\$1,000) dollars.

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That I duly paid to Henry A. Peckham, Esq., the referee, upon the final accounting herein, his fees and stenographer's charges, the sum of two hundred and eighteen dollars and forty (\$218.40) cents.

That I duly paid a dividend of $22\frac{53}{100}$ per centum to all of the creditors of said corporation, except those herein mentioned, and that I have taken a proper voucher therefor; and that all of said creditors, who have accepted said dividend have surrendered to me their certificates of indebtedness of said corporation issued therefor and which were held by them.

That the sum so paid and the creditors to whom paid are as follows, viz.:

(Insert statement.)

That the only creditors and certificate holders who failed to take the dividend decreed to be paid to them are the following, viz.:

(Insert list.)

And to cover said indebtedness I have deposited with George Deyo, as treasurer of the county of Ulster, one hundred and twelve dollars and sixty-five (\$112.65) cents, to cover the said dividends, and to the credit of said certificate holders, and have taken this voucher therefor; subject, however, to the further order and direction of the court in the premises.

That all the moneys so distributed and deposited by me amount to the sum of \$208,189.93.

That herewith I return and duly file all of the vouchers taken by me as aforesaid.

That I have now fully and entirely distributed all of the moneys and assets in my hands. And the undersigned makes this report pursuant to the terms and provisions of the order aforesaid, for the purpose of duly filing the same in the Ulster county clerk's office.

Dated, Saugerties, N. Y., May 15th, 1896.

H. GILLESPIE,

Receiver.

This report may be followed by an order of confirmation.

CHAPTER XXII.

ACTION BY OR AGAINST AN EXECUTOR OR ADMINISTRATOR.

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ARTICLE I.

ACTION, HOW BROUGHT AND CONDUCTED, AND EFFECT OF JUDGMENT. §§ 1814-1818, 1824.

SUB. 1. WHEN ACTION PROPER IN REPRESENTATIVE, AND WHEN IN INDIVIDUAL CAPACITY. § 1814.

2. WHEN PERSONAL AND REPRESENTATIVE ACTIONS JOINED. § 1815.

3. WHAT ACTIONS SURVIVE AND WHAT ABATE BY DEATH.

4. POWERS OF EXECUTOR OF AN EXECUTOR AND EXECUTOR IN HIS OWN WRONG.

5. REGULATIONS AS TO PARTIES AND PRACTICE. §§ 1816, 1817, 1818, 1824.

6. PLEADINGS.

SUB. 1. WHEN ACTION PROPER IN REPRESENTATIVE AND WHEN IN INDIVIDUAL CAPACITY. § 1814.

§ 1814. Action, etc., by and against executor, etc., to be brought in representative capacity.

An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the property of the decedent, except by the special direction of the court, contained therein.

The codifiers' note to § 1814, is as follows:

Heretofore an executor or administrator might, in a large class of cases, sue or be sued in his individual capacity, although the estate was the real party in interest. This rule has come down from the former practice; but it is inconsistent with the principles of the existing procedure, and sometimes leads to an embarrassment in determining in what capacity an action must be brought, and to difficult questions relating to costs. There appears to be no substantial reason why it should not be expressly abolished, except in the case for which the next section provides. See *Beers v. Shannon*, 73 N. Y. 292; *Riseley v. Wrightman*, 13 Hun, 163; *Alger v. Conger*, 17 Hun, 45; *Skellon v. Scott*, 18 Hun, 375; *Cordier v. Thompson*, N. Y. C. P. 18 Alb. L. J. 498.

The provision of this section includes only such causes of action as accrued during the lifetime of the decedent, or are founded on contract made by him. An action upon a demand accruing to a personal representative, through a disposition of funds or property of the estate after the decease of the testator or intestate, may be brought by him in his individual capacity. Where an action might have been so brought, the plaintiff is individually liable therein for costs, though he sues in his representative

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capacity. Where a will gave all the property of decedent to his wife and appointed her his executrix, she took out letters, sold the real estate and invested a portion of the proceeds, taking a bond and mortgage payable to her individually, which came into the hands of defendant, and after the death of the widow, plaintiff was appointed administrator *de bonis non* of the decedent. In an action for the alleged conversion of said securities plaintiff was defeated. *Held*, that he was properly charged individually with costs. *Buckland v. Gallup*, 105 N. Y. 453. Where an executor or administrator has sold, on credit, property of the estate, he may bring an action in his own name to recover the debt, and in such an action a debt against the decedent may not be made the subject of a counterclaim. The old rule, in this respect, has not been changed by § 449 or § 1814. The debt does not belong to him in his representative capacity, within the meaning of the Code, and he, as an individual, is the real party in interest. *Thompson v. Whitmarsh*, 100 N. Y. 35. An executor or administrator can only bring an individual action on a new contract made by him and never existing in favor of decedent. *Kettleman v. Bradt*, 1 St. Rep. 619.

Whatever was the intention of § 1814, as explained by the revisers, if the executor sells property of the estate, an action for the purchase-price is to be brought in his name. *Spencer v. Strait*, 40 Hun, 463. This section has accomplished no change in the law of the State as it previously existed, upon a demand accruing to the personal representatives; through such a transaction they were, by that law, legally authorized to maintain an action for its recovery in their own names as individuals. *Bingham v. Marine National Bank*, 41 Hun, 377, following *Thompson v. Whitmarsh*, 100 N. Y. 35, *supra*, and citing *Merritt v. Scaman*, 6 N. Y. 168, which holds that an executor can maintain a suit either in his own name or as executor upon a note, given to him as executor, for a debt due to the testator at the time of his decease, and that in such an action, brought by the executor in his own name, the defendant cannot offset a demand which existed against the testator at the time of his death. If an injury to the property, or its conversion, happens after the death of the decedent, although before letters are actually issued; or if a contract is made with an executor or administrator personally in regard to effects or money belonging to the decedent received

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by a third person after his death, the administrator might sue in his own name; and if in any of these cases he may sue in his representative character, he is not required to do so. *Valentine v. Jackson*, 9 Wend. 302; *Merritt v. Seaman*, 6 N. Y. 168; *Patterson v. Patterson*, 59 N. Y. 574; *Lyon v. Marshall*, 11 Barb. 241; cited and approved, 105 N. Y. 456, *supra*. See, also, *Holbrook v. White*, 13 Wend. 591; *Babcock v. Booth*, 2 Hill, 181.

A claim for the wrongful conversion of property of a testator during his lifetime belongs to the executor, and can only be enforced by action by him. *Whitney v. Coapman*, 39 Barb. 482. An administrator may sue, on a note made or indorsed to him as administrator, in his own right or in his capacity as administrator. *Bright v. Currie*, 5 Sandf. 433. An executor may sue for conversion occurring after testator's death, and before taking out letters. *Sheldon v. Hoy*, 11 How. 11. An executor who takes a note payable to him as such for a consideration proceeding from the estate, may sue in his representative capacity. *Eagle v. Fox*, 28 Barb. 473. Executors may maintain trespass for injuries done to the personal property of the testator in his lifetime; *Snider v. Croy*, 2 Johns. 227; and under the Civil Damage Act, for injury to decedent's estate by sale of liquor to him; *Kilburn v. Coe*, 48 How. 144; and where a sale of personal property has been made to defraud the creditors of a vendor, his administrator may maintain an action against the purchaser for the value of the property. *McKnight v. Morgan*, 2 Barb. 171. If there be any right of action for the proceeds of real estate sold under order of the surrogate, it is personal and not in a representative capacity. *Burhans v. Blanchard*, 1 Den. 626. An administrator, appointed to administer upon the assets left unadministered at the death of an executor of a testator, may maintain an action in his capacity against the executor of such former executor to recover the assets. It is not material whether such assets have been in part administered. *Walton v. Walton*, 2 Abb. (N. S.) 428, 1 Keyes, 15. One who succeeds another in the administration has an election to continue or not an action commenced by the former representative. *Bain v. Pine*, 1 Hill, 615. See *Livermore v. Bainbridge*, 49 N. Y. 125.

A collector, like other administrators, is the judge of the propriety of his own course in respect to the institution of suits subject to his liability to account, when the administration is terminated

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and his accounts are settled. *Delafield v. Parish*, 4 Bradf. 24. An executor who makes a lease of premises belonging to the estate may recover thereon in his individual capacity. *Kingsman v. Ryckman*, 5 Daly, 13. Prior to the adoption of the Code an administrator could sue in his own name upon a cause of action which had accrued in favor of the estate, since the death of the intestate, and hence could set off such a demand against a claim alleged against him individually. *Silvernail v. Felts*, 18 Week. Dig. 124. An executor may bring an action to set aside a transfer by the decedent, both on the ground of fraud on creditors and of undue influence, and has a right to prove the latter as well as the former ground. If undue influence be proved, the recovery will be for the benefit of the next of kin as well as creditors. *Lore v. Dierkes*, 16 Abb. N. C. 47. An executor may bring an action upon a judgment in favor of his testator against the judgment debtor, without leave of the court, notwithstanding he has the right to have execution on the judgment. *Freeman v. Dutcher*, 15 Abb. N. C. 431. Two executors may sue upon a note given to one of them in his individual name, but in settlement of a claim of the estate without any indorsement. *Leland v. Manning*, 4 Hun, 7. All the executors who have taken out letters must join as plaintiffs. *Scranton v. Farmers and Mechanics' Bank*, 33 Barb. 527. Executors who have not qualified need not join. *Moore v. Willett*, 2 Hilt. 522. A foreign administrator may sue in his own name upon a note payable to his intestate, or bearer. *Robinson v. Crandall*, 9 Wend. 425. An administrator, with the will annexed, may enforce a decree against a removed executor for the assets in his hands. *Clapp v. Meserole*, 1 Keyes, 281.

An action will lie by executors against their co-executor to recover a debt owing by him to the estate in order to reimburse themselves for an amount decreed in their favor, the defendant not having accounted for the same before the surrogate. *Wurts v. Jenkins*, 11 Barb. 546. One of two administrators cannot direct the debtor of an estate to retain the money due from him and not to pay it to the other administrator so as to bar an action by him. *Strever v. Feltman*, 1 T. & C. 277. Where a resident of this State was appointed administrator of a citizen of this State, who died in Connecticut, *held*, he could sue here on a policy of insurance issued by a Connecticut corporation. *Palmer v. Phenix Mut.*

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Life Ins. Co. 84 N. Y. 63. An assignee of a claim in favor of one of two joint executors may maintain an action thereon against them. *Snyder v. Snyder*, 5 Civ. Pro. R. 267, Court of Appeals, reversing 4 Civ. Pro. R. 370. A person cannot sue as administrator of two decedents in one action to recover damages for causing their death. *Danaher v. City of Brooklyn*, 4 Civ. Pro. R. 286. An administrator who sues to recover for a conversion of the decedent's estate, occurring after his death, is personally liable for costs of the action without order of the court. *Feig v. Wray*, 3 Civ. Pro. R. 159. The presenting of a claim to an executor and agreement to refer, without naming the referee, does not bar the continuance against such executor of an action on said claim, begun against the decedent in his lifetime. *Dalton v. Sandland*, 4 Civ. Pro. R. 73. In an action brought in the City Court of New York by an executor as such, a counterclaim existing against plaintiff in his representative capacity may be set up. *Oakes v. Harway*, 6 Civ. Pro. R. 357.

In an action by an undertaker to recover for services relative to burial of defendant's testator, the defendant set up as a counterclaim an indebtedness of her testator, defendant being sole legatee and devisee and executor under the will, and no notice to creditors to present claims having been published and defendant having paid the testator's debts, it was held defendant was entitled to have the amounts of his indebtedness allowed as a counterclaim. *Blood v. Kanc*, 130 N. Y. 514, 52 Hun, 225.

Contracts of executors, although for the benefit of the estate they represent, are the personal contracts of the executors and do not bind the estate. This rule is not changed by § 1814. *Delaware, Lackawanna, etc. R. R. Co. v. Gilbert*, 44 Hun, 291, affirmed on opinion below, 112 N. Y. 673, citing *Thompson v. Whitmarsh*, 100 N. Y. 35; *Buckland v. Gallup*, 40 Hun, 61; *Bingham v. Marine Nat. Bank*, 41 N. Y. 377; same effect, *Blood v. Kanc*, 23 St. Rep. 298; *Matter of Woodard*, 13 St. Rep. 161.

Failure to state that an intestate died leaving property in this State or that letters of administration had been issued by a surrogate having authority, is a fatal defect. *Secor v. Pendleton*, 47 Hun, 281. Where a complaint alleged that a paper was executed by defendant to persons named as executors and trustees, under a will, and that plaintiff had succeeded them, but did not allege that it was an asset of the estate, it was held that the complaint did not

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show a right to recover, the words, "executors and trustees" being only descriptive of the persons. *The U. S. Trust Co. v. Stanton*, 27 Supp. 614. Where a complaint shows a cause of action in favor of plaintiff, in his individual capacity, the word "executor" in the title and statement in the complaint that he is the executor of the will of the deceased person named, do not prevent a recovery by him individually; the descriptive words may be rejected. *Litchfield v. Flint*, 104 N. Y. 543; to same effect, *Wick v. Jewett*, 9 St. Rep. 477; *Schmittler v. Simon*, 101 N. Y. 554.

Where a complaint against a defendant, individually and as administrator, states facts sufficient to constitute a cause of action against him individually, but not as administrator, it is proper to allow costs on sustaining a demurrer on the ground that the complaint fails to state facts sufficient to charge defendant as administrator. *Murphy v. Naughton*, 68 Hun, 424, 52 St. Rep. 756.

Where an executor has loaned moneys of the estate in his individual capacity and takes a mortgage payable to him individually, the cause of action accrues to him personally. *Caulkins v. Bolton*, 98 N. Y. 511, modifying 31 Hun, 458. Contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration, moving between the promisee and the executors as promisors, are the personal contracts of the executors and do not bind the estate, although the executor could properly pay for the same and be allowed the amount as a legitimate expenditure on a settlement of their accounts. *Mander v. Cromwell*, 24 Civ. Pro. R. 368; same case reported as *Mander v. Low*, 12 Misc. 316. It is said in a note to this case at page 374, under the citation *Bingham v. Marine Bank*, 41 Hun, 377, that none of the provisions of § 1814 change the rule as it existed before its adoption, and that it is a mere codification of the rules of law and procedure as they existed before, citing *D. L. & W. R. R. Co. v. Gilbert*, 8 St. Rep. 215; *Ferris v. Disbrow*, 22 Week. Dig. 330; *Matter of Woodard*, 13 St. Rep. 161; *Cary v. Gregory*, 38 N. Y. Super. 127. The principal case also cites *Willis v. Sharp*, 113 N. Y. 586, as to when a charge against the estate can be enforced in an equitable action; also *United States Trust Co. v. Roche*, 116 N. Y. 120.

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A judgment against an executor in his individual capacity must distinctly show that he is adjudged liable. *Warren v. Banning*, 50 St. Rep. 810, 21 Supp. 883. An action cannot be maintained against an executor in his representative capacity upon a transaction which occurred after the testator's death; the executor is individually liable upon such a claim, and must be sued, if at all, as an individual. Section 1814 has made no change in the law in this respect. If an executor is sued on such a claim in his representative capacity, and judgment recovered against him, the General Term has power to amend the judgment-roll by striking from the summons and complaint and subsequent papers the words "as executor," and to affirm the judgment. *Ferris v. Disbrock*, 22 Week. Dig. 330. A contract made by executors as such, in consideration of services to be rendered in vindicating and asserting their claims to the property in their representative capacity, and for the benefit of the estate they represent, does not bind the estate or create a charge upon the estate in the hands of the executors. In an action brought against the defendants as executors, and where the form of the complaint, the substantial averments therein, and the relief demanded characterize the relief as against defendants in their representative capacity, upon demurrer the action cannot be converted into one against defendants individually. *Austin v. Munro*, 47 N. Y. 360. The principle is, that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. *Ferrin v. Myrick*, 41 N. Y. 315; *Reynolds v. Reynolds*, 3 Wend. 244; *Dermott v. Field*, 7 Cow. 58. These cases, with *Austin v. Munro*, 47 N. Y. 360, were cited with approval in *Wetmore v. Porter*, 92 N. Y. 76.

On a life policy, payable to the executors of the insured for the benefit of the father of the insured, the executor is trustee of an express trust and may sue. *Grattan v. National Life Ins. Co.* 15 Hun, 74. The administrator of a purchaser of land under a contract of sale may sue the heirs of the deceased owner to compel them to carry out the contract. *Wheeler v. Crosby*, 20 Hun, 140. An administrator may sue to set aside a conveyance of land by his intestate as fraudulent against creditors whose debts were in existence at the time of the conveyance, there being no personal property to satisfy their claims. The creditors need not be

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judgment creditors. *Barton v. Hosner*, 24 Hun, 467, citing, as to right and duty of administrator to impeach a sale of personal property as fraudulent, when made by deceased with intent to defraud creditors, *Bate v. Graham*, 11 N. Y. 237; *Phelps v. Platt*, 50 Barb. 430; *Sharpe v. Freeman*, 45 N. Y. 802; and as to effect of statute of 1858, *Southard v. Benner*, 72 N. Y. 427; *Allyn v. Thurston*, 53 N. Y. 622. An executor, when empowered by the will to sell land, may recover possession of title deeds from wrong-doer. *Mills v. Mead*, 7 Hun, 36. A promissory note, indorsed in blank by the testator, may be sued upon by the executor in his own name, or he may set it off in an action against him individually, and in which he is individually liable. *Barlow v. Myers*, 24 Hun, 286. A naked power to sell land does not authorize the executor to sue for an award made for taking the land by right of eminent domain. He must also show some right to possession of the money, either for the purposes of administration or as trustee under the will. *Cashman v. Wood*, 6 Hun, 520. The court is not prevented from granting equitable relief between two estates because the plaintiff who sues as administratrix of one estate is also one of the representatives of the other. *Neilly v. Neilly*, 23 Hun, 651.

Action upon a foreign judgment may be brought by a foreign administrator in his individual name. *Nichols v. Smith*, 7 Hun, 580. The assignee of a foreign administrator may sue here for the foreclosure of a mortgage. *Smith v. Tiffany*, 16 Hun, 552. Though a foreign executor may not sue here, he may assign a claim due his testator to another who may sue on it and for the purpose of such suit. *Middlebrook v. Merchants' Bank*, 3 Keyes, 135; *Peterson v. Chemical Bank*, 32 N. Y. 21. A surviving executor may maintain an action in equity against the foreign executor of a deceased co-executor of a deceased, to compel him to account to the extent of the assets in his hands and for the misconduct and breach of trust of his testator. *Price v. Brown*, 10 Abb. N. C. 67. It seems a foreign administrator may foreclose a mortgage by advertisement. *Averill v. Taylor*, 5 How. 476. An administrator here of a foreign intestate may sue a trustee of the intestate. *Fox v. Carr*, 16 Hun, 566. Where a testator by his will authorized his executor to continue a business, and coal was bought to be used in that business, in an action brought against the defendant as executrix, it was held that no cause of action was

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established against her in a representative capacity. *Delaware, L. & W. R. R. Co. v. Gilbert*, 44 Hun, 201, following *Austin v. Munro*, 47 N. Y. 360, *supra*, and *Thompson v. Whitmarsh*, 100 N. Y. 35; but see *Willis v. Sharp*, 43 Hun, 434, 6 St. Rep. 757, *contra*. Where an agreement is made by a defendant personally, and not as executor, he is personally bound. *Hall v. Richardson*, 22 Hun, 444, citing cases *supra*, and *Levin v. Russell*, 42 N. Y. 251; *Camp v. Barney*, 6 T. & C. 624, and distinguished, *Chouteau v. Suydam*, 21 N. Y. 179. See, however, *Willis v. Sharp*, 43 Hun, 435. Contracts of executors, although made in the interest of the estate and for the benefit of the estate they represent, if made upon a new and independent consideration, are the personal contracts of the executors and do not bind the estate. An executor is liable personally upon a note given by him in extinguishment of a debt of the estate represented by him, although signed by him as executor. *Cary v. Gregory*, 38 Super. Ct. 127; *Bloodgood v. Gregory*, 38 Super. Ct. 132. An action can be maintained by a creditor against an administrator to recover the amount of the bonds of the intestate, the payment of which is secured by a mortgage executed by him on real estate. *Thompson v. Sullivan*, 60 How. 71. Though an action will not lie against executors for the fraud of the testator which does not benefit the assets, yet it will lie on a contract fraudulently performed by them. *Troup v. Smith*, 20 Johns. 32. A creditor may maintain an action against an executor, although his application for payment from the estate has been denied by the surrogate. *Fitzpatrick v. Brady*, 6 Hill, 581. Whether an action for services rendered to the estate, in pursuance of a void contract with the decedent in his lifetime, will lie against administrators in their representative capacity, see *Ross v. Harden*, 44 Super. Ct. 26, and 44 Super Ct. 427, affirmed 79 N. Y. 84.

An action will lie by a bank against executors to recover the amount of an over-credit given the testator by mistake, part of which was paid to him in his lifetime and the residue to his executors after his decease — it constitutes but a single cause of action. *Tradesmen's Bank v. McFeely*, 61 Barb. 522. Executors sued as individuals may claim to have acted in a representative capacity. *Bryant v. Bryant*, 2 Robt. 612. In an action against several persons in a representative capacity the plaintiff may have judgment against such as he proves chargeable, though he fail to

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show the liability of all. *Judson v. Gibbons*, 5 Wend. 224. In a suit against the administrator of a deceased agent for an account, the plaintiff may ask judgment against the defendant individually for moneys of the plaintiff and delivery of books and specific property which came into the hands of the deceased agent, and which defendant has possession of and refuses to deliver. *Day v. Stone*, 15 Abb. (N. S.) 137.

A testator bequeathed to one person a legacy, provided the executor should apply so much of the estate as was necessary to the education of another person named. The estate was sufficient for both purposes, but the executor did not keep the funds of the estate separate from his own, but they were mingled with his, and on his death passed to his executor. *Held*, that the executor was liable after demand for the legacy, but the other interested person must be a party to the action. *Theological Seminary of Auburn v. Kellogg*, 16 N. Y. 83.

A pending suit is properly revived against the executor of the survivor of the original defendants. *Scholey v. Halsey*, 72 N. Y. 578. An action will not lie against an executor by an assignee of his individual claim against the estate — it must be presented for allowance on the accounting. *Snyder v. Snyder*, 30 Hun, 186. Where an executor has assumed a personal liability by parol, it is not within the Statute of Frauds. *Hall v. Richardson*, 22 Hun, 444. An action may be continued against an executor notwithstanding an ineffectual effort to refer. *Dalton v. Sandland*, 4 Civ. Pro. R. 33. A foreign executor is not liable to be sued in this State upon the contract of his testator. *Field v. Gibson*, 20 Hun, 274. Our courts have jurisdiction of an action against a foreign executor to compel payment of interest on a legacy. *Brown v. Knapp*, 17 Hun, 160. That action was in form against the defendant as executor; the objection as to form was not taken below. *Held*, that while the suit could have been brought against the executor individually, yet, as the objection was merely technical, it could be disregarded. s. c. 79 N. Y. 136.

Foreign executors or administrators cannot prosecute or defend an action, or be substituted for the deceased, except where they have brought assets into this State. *Matter of Webb*, 11 Hun, 125.

In an action against a foreign executor, where it is not shown that defendant brought assets into this State, the court is without jurisdiction to enforce any liability in that capacity;

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the objection is not waived by appearance and answer. *Gray v. Ryle*, 5 Civ. Pro. R. 387. An action at law cannot be maintained against foreign executors as such. *Field v. Gibson*, 20 Hun, 274; *Metcalf v. Clark*, 41 Barb. 45. Foreign executors may be sued in this State if they are residents or have assets within the State. *Campbell v. Tousey*, 7 Cow. 54; *Montalvan v. Clover*, 32 Barb. 190; *Gulick v. Gulick*, 33 Barb. 92. A suit pending at time of death of a defendant cannot be revived by service upon a foreign executor. *Matter of Webb*, 11 Hun, 124. An executor cannot maintain an action at law to recover from his co-executor a debt due from the latter to the estate. *Dean v. Rosboom*, 12 Week. Dig. 123. One executor cannot maintain an action to foreclose a mortgage made by his co-executor to the testator; it is assets in the latter's hands to be accounted for by him. *Vrooman v. Stimpson*, 7 Week. Dig. 468.

But in *Raynor v. Gordon*, 16 Hun, 126, it was held that where a mortgage given by an executor to his testator prior to the latter's decease is the only asset of the estate, and the executor refuses to pay the same, a judgment creditor of the deceased may maintain an action to compel the sale of the mortgaged premises and the payment of his debt from the proceeds of the sale. In a court of law one executor or administrator cannot sue his co-executor or administrator to recover a debt due from the latter to the estate; his remedy lies in a proceeding in equity. *Smith v. Lawrence*, 11 Paige, 206. An action may be maintained by executors against a co-executor to compel him to pay a debt he owes the estate, and which is necessary to pay a sum decreed by the surrogate to be due from the estate to plaintiffs for moneys paid by them on account of the estate. *Jenkins v. Jenkins*, 11 Barb. 546. An administrator is personally liable for the rent of leasehold property of which his intestate died seized, to the extent of the rents and profits he has received from the premises; the fact that the rents and profits are not sufficient to pay the rent is matter of defence, the law, *prima facie*, supposing them sufficient. *Miller v. Knox*, 48 N. Y. 232. Any person claiming an interest in the personalty may, where the executor claims such interest in his own right, bring suit against him to settle the construction and validity of the provisions of the will so far as plaintiff's interest is concerned, and to enable him to obtain from the executors such portions of the estate as he is either legally or

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equitably entitled to. *Wager v. Wager*, 89 N. Y. 161. Where a will directs an executor to carry on a business and he purchases goods in that business, and is himself insolvent, he may be sued as such executor, and the complaint is good on demurrer. *Willis v. Sharp*, 43 Hun, 435. But see 44 Hun, 201. To bind the estate of a deceased party it is not sufficient that the party who is the representative is a party to the suit; such person must be made a party distinctly in his representative capacity. *Fisher v. Hubbell*, 65 Barb. 74; *Bostwick v. Brush*, 4 St. Rep. 100.

Section 1814 requires an action to be brought in the representative capacity of the party, when the cause of action is held by him as executor or administrator. *Blood v. Kane*, 23 St. Rep. 298.

The production of letters in due form issued by a court having jurisdiction, is sufficient proof of plaintiff's representative character. *Flinn v. Chase*, 4 Den. 85; *Farley v. McConnell*, 7 Lans. 428, affirmed, 52 N. Y. 630; *Parhan v. Moran*, 4 Hun, 717, affirming 71 N. Y. 596, and an administrator may give his letters in evidence though sealed after the commencement of the suit. *Maloney v. Woodin*, 11 Hun, 202. The validity of a will cannot be attacked by one against whom an action is brought for a debt due the estate after issue of letters. *Sullivan v. Fosdick*, 10 Hun, 173. An action by an executor upon a claim, arising out of transactions between the testator and another, must be brought by the executor as such and not in his individual capacity. *Hone v. De Peyster*, 106 N. Y. 645. *Bingham v. Marine National Bank*, 41 Hun, 377, 17 Abb. N. C. 431, 2 St. Rep. 638, is affirmed 112 N. Y. 661.

Where plaintiff delivered a chattel to an executor for the purpose of inventorying it, as alleged by the executor, but without intent to admit it belonged to the estate, she may prosecute an action against the executor in his representative capacity. *Van Slooten v. Wheeler*, 27 Supp. 666, 59 St. Rep. 147.

It is not a defence against an administrator in an action brought by him for money lent to decedent, that plaintiff did not present his claim within the time limited by the Code to creditors, or that it was not unreasonably resisted or neglected when it is not claimed that the assets of the estate have been distributed. *Lesser v. Keller*, 29 Supp. 829.

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SUB 2. WHEN PERSONAL AND REPRESENTATIVE ACTIONS JOINED.

§ 1815.

§ 1815. When personal and representative causes of action may be joined.

An action may be brought against an executor or administrator, personally, and also in his representative capacity, in either of the following cases:

1. Where the complaint sets forth a cause of action against him in both capacities, or states facts, which render it uncertain, in which capacity the cause of action exists against him.

2. Where the complaint sets forth two or more causes of action against the defendant, in different capacities, all of which grow out of the same transaction, or transactions connected with the same subject of action; do not require different places or modes of trial; and are not inconsistent with each other.

In a case specified in this section, a judgment for the plaintiff for a sum of money must distinctly show, whether it is awarded against the defendant personally, or in his representative capacity.

The note to § 1815 is as follows:

The first subdivision is chiefly designed to provide for some cases where the last section may bear hardly upon the plaintiff. It sometimes happens that the plaintiff may be able to charge the defendant in both capacities, especially in equity; for instance, if a surviving partner of the decedent is one of his executors, a creditor may require him to account, if necessary, in both capacities. Again, it may be uncertain in which capacity a defendant is liable, as where the plaintiff's agent dies, without having accounted, and his executor takes possession of all the effects found in his possession, some of which are the plaintiff's, but the plaintiff is unable to distinguish his own from the decedent's. The second subdivision is designed to extend the same principle to cases where the causes of action are distinct in accordance with section 484, *ante*, subdivision 9, and the concluding sentence. See *Ross v. Harden*, 44 Super. Ct. (J. & S. 26).

It is said in *Brigham v. Marine National Bank*, 41 Hun, 379, that under *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munro*, 47 N. Y. 360; *Patterson v. Patterson*, 59 N. Y. 574, before the Code of Civil Procedure, a cause of action which had accrued to the testator or his estate could not be united with another accruing to the personal representatives after the decease. An administrator may be sued as such, and individually, in an action asking an account, the delivery of books and specific property, and the payment of money. *Day v. Stone*, 15 Abb. (N. S.) 157. A plaintiff may unite a cause of action as executor with one as devisee, where both accrued under a contract, made by the testator with defendant, growing out of the same matter. *Armstrong v. Hall*, 17 How. 76. A demand for rent against executors of a tenant, accruing during the lifetime of the tenant and during

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their own occupation, may be sued for in one action. *Pugsley v. Aikin*, 11 N. Y. 494. But in *Hall v. Hall*, 20 Barb. 441, it was held error for plaintiff to unite a cause of action accruing to him individually with one accruing in his representative capacity. It is improper to join in one complaint prayers for relief against the defendant personally and in his representative capacity as executor. *McMahon v. Allen*, 12 How. 39. Where the declaration shows a contract made by the testator and not by the executor, only a promise made by the testator and by the executor may be joined. *Benjamin v. Taylor*, 12 Barb. 328. A count on a contract made by an administrator as such, on which he is not personally liable, may be joined with one on a promise by the intestate, and such promise by the intestate may be laid in the same count. *Pugsley v. Aikin*, 11 N. Y. 494. In a suit against an administrator, a suit on a cause of action, arising after the death of the testator cannot be joined with one on a cause of action arising in his lifetime. *Demott v. Field*, 7 Cow. 58; *Reynolds v. Reynolds*, 3 Wend. 244; *Latting v. Latting*, 4 Sandf. Ch. 31; *Myer v. Cole*, 12 Johns. 349; *Austin v. Munro*, 4 Lans. 67; s. c. 47 N. Y. 360. In an action against an executor counts which require different judgments cannot be joined. *Cark v. Coles*, 50 How. 178.

It was because of the impossibility of determining always from a given state of facts whether an individual or representative liability was created, that § 1815 was enacted so as to enable the court upon facts to determine whether to hold an executor liable in his official or individual capacity. *Newcomb v. Lottimer*, 12 Supp. 381. Under § 1815, an action under certain conditions may be maintained against an executor, both as an individual and in his representative capacity. *Perkins v. Slocum*, 82 Hun, 366. An action may be maintained against a defendant to recover against him both personally and as administrator, in case he is liable in both capacities. *Gibson v. Blakley*, 85 Hun, 305, 66 St. Rep. 489. Where the complaint sets forth a cause of action against a person, both as administrator and personally, there is no misjoinder where defendant is sued individually and as administratrix for the funeral expenses of her husband, although an administrator cannot be charged in his representative capacity for the funeral expenses of decedent, the liability therefor being only personal. *Murphy v. Naughton*, 68 Hun, 424, 23 Supp. 52.

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SUB. 3. WHAT ACTIONS SURVIVE AND WHAT ABATE BY DEATH.

The following sections were left unrepealed by the repealing act, and are still in force. R. S. 9th ed. pp. 1907, 1908.

SECTION 1. For wrongs done to the property, rights or interest of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death by his executors or administrators, against such wrong-doer, and after his death against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contracts.

§ 2. But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator.

§ 11. An executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof as such executor.

§ 17. No person shall be liable to an action, as executor of his own wrong, for having received, taken or interfered with the property or effects of a deceased person; but shall be responsible as a wrong-doer, in the proper action, to the executors or general or special administrators of such deceased person for the value of any property or effects so taken or received, and for all damages caused by his acts to the estate of the deceased.

§ 18. When administration of the effects of a deceased person, which shall have been left unadministered by any previous executor or administrator of the same estate, shall be granted to any person, such person may bring a writ of error upon any judgment obtained against such previous executor or administrator of the same estate, or against the original testator or intestate; and shall defend any writ of error brought upon any such judgment; and shall have the same remedies in the prosecution or defence of any action by or against such previous executors or administrators, and for the collection and enforcing of any judgment obtained by them as they would have by law.

The provisions of the Revised Statutes cited are in full force and effect since the Code. *Moore v. McKinstry*, 37 Hun, 198, citing *Murphy v. N. Y. C. & H. R. R. Co.* 31 Hun, 358; *Kelsey v. Jewett*, 34 Hun, 11; *Cregin v. Brooklyn, etc. R. R. Co.* 75 N. Y. 192.

The executor of the vendor may revive a suit for specific performance without bringing in the heir at law. *Daniel v. Brodie*, 3 Edw. 275. Executors may maintain trespass for an injury to the personal property of the testator during his lifetime. *Van Vechten v. Croy*, 2 Johns. 227; *Heinmuller v. Gray*, 44 How. 60. An action for waste survives to the personal representative of the reversioner. *Rutherford v. Aikin*, 3 T. & C. 60. A right of action against an attorney for negligence survives against his per-

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sonal representatives. *Elder v. Bogardus*, Lalor, 116. An action for a wrong to property survives in favor of the representative of the injured party. *Dininny v. Fay*, 38 Barb. 18. Actions for wrongs to the property, rights or interests of another may be maintained against the executors or administrators of the wrongdoer, where they are not brought for slander, libel, assault and battery, false imprisonment, or on the case for injuries to person of plaintiff, or of the testator or intestate of any administrator. *Bond v. Smith*. 4 Hun, 48. Proceedings instituted by the next of kin of one whose will has been admitted to probate do not abate by reason of the death of contestant. *Van Alen v. Hewins*, 5 Hun, 44.

A cause of action for money due on contract to be performed, or gained by the labor or property of another, or on a promise, express or implied, by the decedent, survives, and so when it is for property rights or interests. *State of New York v. Starkweather*, 40 Super. Ct. 453. An action to recover damages for fraudulent representations, whereby plaintiff was induced to purchase stock in a corporation, does not abate on the death of a defendant, but may be continued against his personal representatives. *Graves v. Spicer*, 58 Barb. 349; *Haight v. Hoyt*, 19 N. Y. 464; *Byrnie v. Wood*, 24 N. Y. 612. A cause of action to enforce the personal liability of a stockholder, by reason of commencing business before the capital is paid in, survives. *Chase v. Lord*, 16 Hun, 369. S. C. 77 N. Y. 1. An action by a husband against a carrier of passengers to recover for the loss of services of his wife, and expenses paid in consequence of injuries to her person, resulting from defendant's negligence while she was a passenger, is an action in tort, but it does not abate on the death of the plaintiff, but may be continued by his personal representatives. It is within the provision of the statute preserving from abatement actions "for wrongs done to the property, interests or rights of another," and is not included in the exception thereto of actions on the case for injuries to the person of plaintiff. All pecuniary injuries not within the exception are placed upon the same footing when occasioned by a tort, as if arising from a breach of contract. *Cregin v. Brooklyn, etc. R. R. Co.* 75 N. Y. 192, distinguishing *Wade v. Kalbfleisch*, 58 N. Y. 282. See *Doedt v. Wiswall*, 15 How. 128; *Yertore v. Westfall*, 16 N. Y. 8. When it is stipulated that an action for a personal tort shall not abate by

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death of plaintiff, his executors may revive the suit. *Cox v. N. Y. C. & H. R. R. Co.* 11 Hun, 631. An action of foreclosure, commenced by the testator against the mortgagor, who is one of his executors, does not abate by his death. His co-executor must revive the suit against him. *McGregor v. McGregor*, 35 N. Y. 218. An action is properly revived against the executors of the survivor of the original defendants. *Scholey v. Halsey*, 72 N. Y. 578.

An action in the nature of replevin, brought by an assignee for the benefit of creditors, to recover damages from a sheriff for the tortious taking of assets, does not abate by death of plaintiff. *Emerson v. Bleakley*, 5 Abb. (N. S.) 350. An action of replevin does not abate by death of plaintiff. *Lahcy v. Brady*, 1 Daly, 443; *Potter v. Van Franken*, 36 N. Y. 619. See, however, *Webber v. Underhill*, 19 Wend. 447; *Burkle v. Luce*, 6 Hill, 558, s. c. 1 N. Y. 163; *Hopkins v. Adams*, 5 Abb. 350, holding that on death of a plaintiff in replevin the action abates. But the rule is now settled by § 1736, Code of Civil Procedure, which see. Where, pending an appeal from a judgment in favor of copartners, one of them collusively enters satisfaction, which is set aside as to the other partner only, and the latter dies, the action survives to his representatives. *Hackett v. Belden*, 40 How. 289. Where several part owners of a vessel sue for its conversion, and one of them dies, the action survives to the other plaintiffs. *Bucknam v. Brett*, 35 Barb. 596.

The right to recover damages for selling liquor to an habitual drunkard survives to his personal representatives. *Kilburn v. Coc*, 48 How. 144. Though an action for fraud of the testator will not lie against the executor, which does not benefit the assets, yet it will lie on a contract fraudulently performed by him. *Troup v. Smith's Executors*, 20 Johns. 33. An action for libel dies with the defendant, and cannot be revived against his personal representatives. *More v. Bennett*, 65 Barb. 338. A cause of action, though sounding in tort, yet if founded on an implied contract, and the plaintiff have the right to waive the tort and bring his action on the contract, survives against the personal representatives. *People v. Starkweather*, 40 Super. Ct. 453. When one of two defendants in an action dies, his executors cannot be substituted, unless they could have joined had the suit been brought after the death of the testator. *Hauck v. Craighead*, 67

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N. Y. 432. A cause of action arising out of contract survives the death of the plaintiff, and passes to his administrator; so held in an action to recover taxes paid by the lessor, which the lessee had agreed to pay. *Holsman v. St. John*, 90 N. Y. 461. The statutory action for damages for negligence causing death was said to lie against the personal representatives of a wrong-doer in favor of the personal representatives of the deceased, in *Hegerich v. Keddle*, 32 Hun, 141; but this was reversed, 99 N. Y. 258. A cause of action for fraud does not abate where it is shown defendant gained a pecuniary advantage by reason of it. *Moore v. McKinstry*, 37 Hun, 194.

An action brought by members of a firm by reason of an alleged slander, relating to the financial condition and credit of the firm, does not abate by the death of one of the plaintiffs during its pendency. The entire cause of action vests in the surviving plaintiffs, and may be prosecuted by them. *Shale v. Schantz*, 35 Hun, 622. An action to charge trustees of a manufacturing corporation for its debt, by reason of default in filing annual report, does not abate by the death of the plaintiff, although it would abate by death of defendant. *Zoller v. O'Keefe*, 15 Abb. N. C. 483; *Bonnell v. Griswold*, 15 Abb. N. C. 470. An action to recover possession of land in which plaintiff's intestate had a life estate survives as to damages, and a supplemental complaint may be filed. *De Lisle v. Hunt*, 36 Hun, 620. An action brought by a highway commissioner as such survives to his successor, and not to his personal representative. *Pratt v. Sealey*, 20 Week. Dig. 280. A cause of action against a plumber for improperly making repairs, owing to which plaintiff's health and that of his family was injured by escaping gas, and for trouble and expense in providing care and medical treatment for his children, abates by the plumber's death, so far as the action was brought for damages to plaintiff's person, but survives so far as it was brought to recover damages and expenses occasioned by children's sickness. *Scott v. Brown*, 24 Hun, 620.

On the death of a plaintiff in an action to enjoin an injury to his real property, the action cannot be sustained for an injunction, but his executors may proceed in the action to recover damages which belong to them as personal representatives. *Matthews v. D. & H. Canal Co.* 20 Hun, 427. See, however, *Johnson v. Elwood*, 82 N. Y. 362.

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In an action for specific performance, brought against executors on a contract of their ancestor, *held*, that the death of one of the defendants did not abate the action, but that plaintiff could recover against the survivors, and a suggestion of the death on the record was all that was necessary. *Patterson v. Copland*, 52 How. 460. In an action to compel defendants to account, as distinguished from an action on a joint contract, if a case for accounting by defendants is shown, the death of one of them does not abate the action as to him, but even the surviving co-defendant may have the executor or administrator brought in as defendant. *Halstead v. Cockroft*, 40 Super. Ct. 519.

In an action for personal injury caused by defendant's negligence the defendant may lawfully stipulate, as a condition of obtaining a postponement, that neither the cause or the cause of action shall abate in case the plaintiff dies before a verdict. *McGuire v. N. Y. C. R. R. Co.* 6 Daly, 70. Where one of several defendants dies, if the cause of action survives, the court has power to require his personal representatives to be substituted even after judgment, in order to allow amendment and a new trial. *Underwood v. Sutcliffe*, 21 Hun, 357. The power to assign and to transmit to personal representatives are convertible propositions. *People v. Tioga Common Pleas*, 19 Wend. 73; *Butler v. N. Y. & Erie R. R. Co.* 22 Barb. 110; *Zabriskie v. Smith*, 13 N. Y. 332; *Platt v. Stout*, 14 Abb. 178; *Meech v. Stoner*, 19 N. Y. 26. The expression "actions on the case for injuries to the person," is used in its literal sense, and not in the same sense as personal right of action. *Fried v. N. Y. C. R. R. Co.* 25 How. 285. In an action brought by a partnership, the cause of action does not go to the deceased plaintiff, but remains in the survivors. *Williamson v. Moore*, 5 Sandf. 647; *Taylor v. Church*, 9 How. 190.

An action in the nature of ejectment against a sole defendant did not survive. *Moseley v. Moseley*, 11 Abb. 105; *Putnam v. Van Buren*, 7 How. 31; *Kissam v. Hamilton*, 20 How. 369. But see provisions of Code of Civil Procedure, §§ 1521, 1522, 1523. See, also, §§ 755, 766.

When a defendant who has been enjoined from entering upon lands and cutting and removing timber dies before trial, the action abates and no order can be made except to that effect. *Johnson v. Elkwood*, 82 N. Y. 362. An action against a physician, alleging malpractice, does not survive; *Best v. Vedder*, 58 How.

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187; nor an action for seduction; *Holliday v. Parker*, 23 Hun, 71; or breach of promise to marry. *Wade v. Kalbfleisch*, 58 N. Y. 282. In the latter case it is said that such an action is not within the provision of the statute, that such an action does not relate to property interests, but to personal injuries, and cannot be revived against an executor or administrator, citing *Zabriskie v. Smith*, 13 N. Y. 322. An action for slander does not survive even where plaintiff dies pending appeal. *Spooner v. Keeler*, 51 N. Y. 527. Nor does an action for libel. *More v. Bennett*, 65 Barb. 338.

An action against a sheriff for a false return does not survive where the plaintiff dies pending the suit. So held in *Benjamin v. Smith*, 17 Wend. 208. An action for damages for fraud in inducing plaintiff to marry does not survive; it is for injury to the person. *Price v. Price*, 75 N. Y. 244, affirming 11 Hun, 299. The death of one co-plaintiff abates an action for trespass. *Dyckman v. Allen*, 2 How. 17. The cause of action given by § 1902 of the Code does not survive against the representatives of the wrongdoer, the action being for negligence of their decedent. *Hege-rich v. Keddie*, 99 N. Y. 258. And the same rule was applied on authority of latter case to an action under Civil Damage Act. *Moriarty v. Bartlett*, 99 N. Y. 651. An action for divorce dies with the plaintiff. Her attorney cannot thereafter take steps to enforce an order previously made. *Hopkins v. Hopkins*, 21 Week. Dig. 174. A proceeding for the judicial settlement of the accounts of an administrator abates by his death and cannot be revived by his personal representatives. *Herbert v. Stevenson*, 3 Dem. 236. An action for dower abates upon the death of the widow before the entry of an interlocutory judgment, and cannot be revived and carried on by her personal representatives, notwithstanding she had served and duly executed and acknowledged a consent to accept a gross sum in lieu of dower. *Keen v. Fish*, 33 Hun, 28, affirmed without opinion, 98 N. Y. 645. Causes of action to recover damages for personal injuries, in this case knowingly letting unhealthy tenements, do not survive the death of the landlord. *Victory v. Krauss*, 41 Hun, 533. The substitution of a successor in office is authorized only where the cause of action survives. *Hughes v. Rathbone*, 3 Alb. L. J. 71. An action against trustees of a corporation for a failure to file the report does not survive. *Bank of California v. Collins*, 5 Hun, 209; *Reynolds*

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v. *Mason*, 54 How. 213, affirmed, 6 Week. Dig. 531. An action against a trustee of a manufacturing corporation for failing to file an annual report is *ex delicto*; it is not in any respect based on the theory of recovering compensation to the injured party for damages sustained by reason of the omission complained of. Such a cause of action, therefore, is not within 2 R. S. 448, § 18. The action cannot be revived against the personal representatives of a deceased defendant. *Stokes v. Stickney*, 96 N. Y. 323; *Brckett v. Griswold*, 103 N. Y. 425. The rule of the common law governs the question as to the survivability of a cause of action to recover the penalty imposed upon the trustee of a corporation who has joined in making a false annual report. It is not affected by any provision of the Code, and the action abates upon the death of either party. *Blake v. Griswold*, 104 N. Y. 613.

After judgment for specific relief, as in foreclosure on the death of the plaintiff, his representatives, or the assignee of his executor, may file a supplemental complaint, in accordance with the former practice, to enforce the judgment. *Robinson v. Brisbane*, 7 Hun, 180. Where plaintiff, on procuring an injunction, gave the usual undertaking, and defendant, having obtained judgment, died, *held*, that an order of revival was not necessary as the executor could obtain all his rights by an action on the undertaking. *Grissler v. Stuyvesant*, 1 Hun, 116, but in *Kelsey v. Jewett*, 34 Hun, 11, it was held otherwise.

It was held in *Spooner v. Keeler*, 51 N. Y. 527, that where an order granting a new trial was reversed on appeal, in a personal action, the verdict would be set aside, though a new trial could not be ordered. But this rule was intended to be changed by Code, § 764. See, however, *Kelsey v. Jewett*, 34 Hun, 11. On appeal in foreclosure the hearing was ordered to stand over to enable appellant to revive. *Jay v. De Groot*, 1 Hun, 118. Where defendant died after delivering summons to sheriff, but before service, *held*, the action could not be continued against his personal representatives. *Palmer v. Ensign*, 19 Alb. L. J. 399. Where the plaintiff, in an action to recover a penalty against a trustee of a manufacturing corporation for making a false annual report, dies after the rendition of judgment, the action does not abate; the cause of action is merged in the judgment which passes as assets to the representatives of the deceased, and they are entitled to be substituted in his place; until such substitution the

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appeal cannot be heard. *Blake v. Griswold*, 104 N. Y. 613. Where after issue joined, and before trial of an action of ejectment, brought by a grantee in the name of his grantors, one of the plaintiffs dies, the remedy for the defect is to amend the complaint and proceed *de novo*. *Doherty v. Matsell*, 17 Abb. N. C. 377.

In an action against executors to recover for services to the testator, defendants, under a general plea of payment, are entitled to give proof of any agreement between the parties in the lifetime of the testator that operated to discharge the debt. *McLaughlin v. Webster*, 141 N. Y. 76, 35 N. E. Rep. 1081, 56 St. Rep. 541.

In an action of an executor, a demand against the decedent, which fell due after his death cannot be set up as a counterclaim. *Jaeger v. Bowery Bank*, 8 Misc. 150, 59 St. Rep. 385, 29 Supp. 303.

While an action at law cannot be maintained by an executor against his co-executor for the demand due the estate from him individually, a suit in equity may be. *Rogers v. Rogers*, 75 Hun, 133, 57 St. Rep. 793, 27 Supp. 276.

Where after the death of an insolvent debtor, money belonging to the estate was paid over in fraud of creditors, though in fulfillment of a promise made by decedent in his lifetime, it was held to be recoverable by his executor under chapter 314, Laws of 1858. *Truesdell v. Bourke*, 80 Hun, 55, 61 St. Rep. 600, 29 Supp. 849. An administrator may maintain an action to set aside transfers fraudulent against creditors, made by his intestate, under the provisions of chapter 314, Laws of 1858.

An administrator with a will annexed can maintain an action in the Supreme Court and obtain an attachment against an executor who has left the State for conversion of assets of the estate, and recover of those unadministered. *Van Camp v. Scarle*, 79 Hun, 134, 61 St. Rep. 349, 29 Supp. 757. A claim against decedent's estate must be presented in writing, and where an administratrix paid out moneys of the estate in good faith, she was held to be protected, although notified of the claim, no formal presentation of it having been made. *Matter of Morton*, 7 Misc. 343, 58 St. Rep. 515, 28 Supp. 82, see 24 Abb. N. C. 292, as to presentation of claim before suit. Where an executor, under directions contained in the will of his testator, continues the business of the testator, an indebtedness for goods sold is due to him in his representative capacity, and he may sue as such. *Varnum v. Taylor*, 59 Hun, 554, 37 St. Rep. 796, 14 Supp. 242.

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In *Sheldon v. Sheldon*, 33 St. Rep. 754, 11 Supp. 477, it was held that plaintiff was not concluded by a decree on the accounting of executors to which he was a party in undertaking to recover a claim against the estate. An executor's contract for the expenses of his testator is binding upon him personally. *Tracy v. Frost*, 32 St. Rep. 907, and services improving a will are properly chargeable against the estate and not against the administratrix personally. *Boynton v. Laddy*, 32 St. Rep. 578, 10 Supp. 622; *Rousseau v. Bleau*, 29 St. Rep. 334, 8 Supp. 823.

A reference, under the provisions of the Revised Statutes, of a claim against an estate was held to be a special proceeding in *Eldred v. Eames*, 115 N. Y. 401, 26 St. Rep. 277, 17 Civ. Pro. R. 413, reversing 48 Hun, 243 and 17 St. Rep. 911, and it was held that the referee possessed only the powers conferred by the statute or fairly inferable from its provisions. Further, that the referee had no power of amendment and could not vary the matter referred. This was in 1889, previous to the amendment of the Code, § 2718, in 1893.

An action brought by a husband for the loss of his wife's society and services, because of personal injuries, caused by defendant's negligence, survives, and may be revived in the name of the husband's personal representative. *Foels v. Town of Tonawanda*, 48 St. Rep. 150, 20 Supp. 447. Where an action was commenced by personal service on some defendants and had not been completed as to others served by publication when plaintiff died, it was held that it was properly continued as to the former in the name of the executrix, although as to the latter defendants the action was suspended. *Reilly v. Hart*, 130 N. Y. 625, 42 St. Rep. 655. The remedy of a municipal corporation against a land-owner, who by reason of omitting his statutory duty to keep the adjoining sidewalk in repair, had caused a recovery against the city for damages for personal injuries, survives the death of the defendant. *City of Rochester v. Campbell*, 55 Hun, 138, 28 St. Rep. 194, 8 Supp. 252. The liability of the stockholder of a limited liability company is in the nature of a liability arising out of contract, and the cause of action survives the death of the stockholder and may be enforced against his personal representatives. *Cochran v. Wicchers*, 119 N. Y. 399, 29 St. Rep. 388, affirming 25 St. Rep. 571, and 6 N. Y. Supp. 304. An action against an elevated railroad for an injunction in damages is not an action for trespass

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and may be revived on death of the plaintiff. *Sanders v. N. Y. Elevated R. R. Co.* 27 St. Rep. 795, 7 Supp. 641.

 SUB. 4. POWERS OF EXECUTOR OF AN EXECUTOR, AND EXECUTOR
IN HIS OWN WRONG.

The right which an executor of an executor formerly had to the goods, etc., of the first testator at common law no longer exists, and such an executor is not to interfere with the estate of the first testator. A surviving executor and trustee has a right to the exclusive possession of the property of the estate. *Shook v. Shook*, 19 Barb. 653; *Theological Seminary of Auburn v. Colc*, 18 Barb. 370.

Where an executor *de son tort* subsequently takes out letters testamentary, his responsibility relates back to the death of the testator or to his own acts of interference. *Farrrell's Estate*, 1 Tuck. 110; *Rattoon v. Overacker*, 8 Johns. 126. Under the Revised Statutes no one can be held to account as an executor *de son tort*. *Muir v. Leake and Watts Orphan House*, 3 Barb. Ch. 477. An executor who has not taken out letters testamentary cannot be cited to account. *Weaver v. Marvin*, 14 Barb. 376. An ordinary action at law will not lie against a foreign executor as an executor *de son tort*. *Metcalf v. Clark*, 41 Barb. 45. See on this point, *Campbell v. Tousey*, 7 Cow. 64; *McNamara v. Dwyer*, 7 Paige, 239; *Gulick v. Gulick*, 33 Barb. 92. Since the Revised Statutes the personal representative of a fraudulent grantor may controvert the validity of the sale, and ordinarily he alone. *Matter of Raymond*, 27 Hun, 511, citing *Babcock v. Booth*, 2 Hill, 185, and *Bate v. Graham*, 11 N. Y. 237. The act of 1858, chapter 314, gives such power to an executor. Where executors named in a will did not qualify, but took possession of property of the testator, they were held to take as wrongdoers, and the remedy of a legatee is to have an administrator appointed who would have a right to recover the property or its value. *Quackenbush v. Quackenbush*, 42 Hun, 329. The provisions of this statute are not inconsistent with § 2606 of the Code, giving authority to a surrogate to compel an executor of another executor to account for property received by the latter. *Matter of Fithian*, 44 Hun, 457.

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 SUB. 5. REGULATIONS AS TO PARTIES AND PRACTICE. §§ 1816, 1817,
1818, 1824.

§ 1816. Id.; separate dockets and executions.

In a case specified in the last section, or where costs, to be collected out of the individual property of an executor or administrator, are awarded in an action by or against him in his representative capacity, so much of the judgment, as awards a sum of money against him personally, may be separately docketed, and a separate execution may be issued thereupon, as if the judgment contained no award against him in his representative capacity.

§ 1817. Regulations, when some of the executors, etc., are not summoned.

In an action or special proceeding against two or more executors or administrators, representing the same decedent, all are considered as one person; and those who are first served with process, or first appear, must answer the plaintiff. Separate answers, by different executors or administrators cannot be required or allowed, except by direction of the court. Judgment in favor of the plaintiff may be entered, and, in a proper case, execution may be issued, against all the defendants, as if all had appeared. But this section does not affect the plaintiff's right to bring into court all the executors or administrators, who are parties.

§ 1818. Executors who have not qualified, not necessary parties.

One of two or more executors, to whom letters testamentary have not been issued, is not a necessary party to an action or special proceeding, in favor of or against the executors, in their representative capacity.

§ 1824. Want of assets not to be pleaded by executor, etc.

In an action against an executor or administrator, in his representative capacity, wherein the complaint demands judgment for a sum of money, the existence, sufficiency or want of assets shall not be pleaded by either party; and the plaintiff's right of recovery is not affected thereby, except with respect to the costs to be awarded, as prescribed by law. A judgment in such an action is not evidence of assets in the defendant's hands.

Section 1824 is new, and said by the codifiers to be the key-note to the reform proposed by them in this class of cases. It supersedes various statutory provisions.

In an action against several executors, such of them as are first served or first appear are entitled to answer for the estate; collusion between the plaintiff and executor who first answers does not give his co-executors a right to answer without leave of the court. *Salters v. Pruyn*, 15 Abb. 224.

Under section 1817 an executor who was not served with summons, but who has appeared by counsel upon a reference of the cause and participated upon a trial of issues raised by answer of his co-executor, may be allowed, upon application to the court, to serve a separate answer raising new issues upon terms and

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without prejudice to the proceedings already had. *Guernsey v. Cheyne*, 18 Abb. N. C. 361.

Although the common-law rule that all executors must join in an action, as well those who prove the will as those who renounce, has been changed by statute so far as to except those to whom letters testamentary shall not have been issued and who have not qualified, an executor who has proved the will, and to whom letters have been issued jointly with another, is a necessary party to a suit brought by the latter. *Scranton v. Farmers and Mechanics' Bank*, 33 Barb. 527. But those named as executors to whom letters have not been issued need not be joined. *Moore v. Willett*, 2 Hilt. 522. And when two executors are appointed by the will of a non-resident, and both qualify at testator's residence, but only one takes out letters here, the other is not a necessary party. *Lawrence v. Townsend*, 88 N. Y. 24. One named as executor, but who has not qualified, may maintain an action on his own behalf as an individual against an executor qualifying. *Hunter v. Hunter*, 19 Barb. 631.

It is not error in an action against an executor to exclude evidence showing that decedent left no assets. *Beardslee v. Hemingway*, 65 Hun, 400, 47 St. Rep. 922.

In *Syms v. The Mayor*, 105 N. Y. 153, it was held that the judgments entered below should not have contained provisions that defendants should have execution for their costs, as such execution could only be issued when allowed by the surrogate, but that this was a matter to be limited by motion.

Where it was shown that at the time of the death of testatrix she had a large amount of debts and her estate was insolvent, it was held the appointment of a receiver was improper and that the mode prescribed by law is that provided for in §§ 1825, 1826, 2717 and 2718. *Willis v. Sharp*, 115 N. Y. 396.

In *Columbus Watch Co. v. Hodenpyl*, 135 N. Y. 430, *Willis v. Sharp* was distinguished, and it was held that § 1824 and § 1826 did not apply, since the fund belonging to the estate was left, under the directions of the will, invested in the business, and the executors became copartners and the debts incurred in the business were claims upon the partnership and the creditors dealing with it had the usual rights of partnership creditors.

Section 1824 and the two following sections are cited in *Matson v. Abbey*, 70 Hun, 475, the opinion in which is adopted in 141

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N. Y. 179. The fact that a judgment creditor has been authorized by the surrogate to issue execution against the executors of the decedent's estate does not authorize taking proceedings supplementary to execution. The remedy in such case is to present the demand to the executors and receive the distributive share to which plaintiff may be entitled with other creditors having similar claims. *Collins v. Beebe*, 54 Hun, 318.

SUB. 6. PLEADINGS.

The executor or administrator should aver his appointment in this State. *Campbell v. Tousey*, 7 Cow. 64; *McNamara v. Dwyer*, 7 Paige, 239; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Vroom v. Van Horne*, 10 Paige, 549; *Williams v. Storrs*, 6 Johns. Ch. 353; *Smith v. Webb*, 1 Barb. 230; *Vermilya v. Beatty*, 6 Barb. 429; *Robbins v. Wells*, 26 How. 15. The time and place of granting letters should be stated. *Rightmyer v. Raymond*, 12 Wend. 51; *Morgan v. Lyon*, 12 Wend. 265; *Sheldon v. Hoy*, 11 How. 11; *Beach v. King*, 17 Wend. 197; *Gillett v. Fairchild*, 4 Den. 80; *Chautauqua Bank v. White*, 6 N. Y. 236; *Wheeler v. Dakin*, 12 How. 537; *Forrest v. Mayor*, 13 Abb. 350. It should appear by averment that plaintiff sues in his representative capacity. *Welles v. Webster*, 9 How. 251. And the word "executor" in a summons and complaint may be treated as mere surplusage where nothing appears therein indicating that suit is in a representative capacity. *Bannon v. McGrave*, 45 Super. Ct. 517. If the capacity in which plaintiff sues appears in the body of the complaint, it is sufficient, even if it does not appear in the title. *Cordier v. Thompson*, 8 Daly, 173. Where the complaint showed the cause of action due plaintiff as executor, it was held to show he sued in his representative capacity. *Scranton v. Farmers' Bank of Rochester*, 33 Barb. 527, affirmed, 24 N. Y. 424. Where the complaint shows by its averments that plaintiff was acting in his representative capacity, the omission in the title, of the word "as" does not prevent him from maintaining the action in his representative capacity. *Beers v. Shannon*, 73 N. Y. 292. The court will look to the whole of the complaint to determine whether a person named as executor sues in his representative or individual capacity. *Stikwell v. Carpenter*, 62 N. Y. 639; *Patterson v. Copeland*, 52 How. 460. In an action for the debt of the testator, the complaint may allege the defendants sue "as" executors, or may

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set forth their representative character. *Yates v. Hoffman*, 5 Hun, 113. The body of the complaint should state the facts, in an issuable form, as to the representative capacity if the suit is so intended. *Forrest v. Mayor*, 13 Abb. 350. Where there are no allegations as to representative capacity in the complaint, the word "executor" without the word "as" will be considered as *descriptio personæ*. *Merritt v. Scaman*, 6 N. Y. 168; *Stilwell v. Carpenter*, 62 N. Y. 639; *Butterfield v. Macomber*, 22 How. 150; *Sheldon v. Hoy*, 11 How. 11; *Hallett v. Harrower*, 24 N. Y. 537; *Murray v. Hendrickson*, 6 Abb. 96; *Root v. Price*, 22 How. 372. An averment of representative capacity, and that the action is brought as such, is sufficient. *Fowler v. Westervelt*, 40 Barb. 374; *Welles v. Webster*, 9 How. 251. An error in the description of the representative character of plaintiff is amendable. *Risley v. Wightman*, 13 Hun, 163.

Where plaintiffs were described as administrators and alleged that defendant's intestate was indebted to plaintiffs without alleging privity to their intestate or to them as administrators, but closed by stating it was to the damage of them as administrators, it was held an action as individuals. *Worden v. Worthington*, 2 Barb. 368. Where letters to foreign executors were granted by the surrogate it is not requisite in a suit by them to allege the probate of the will. *Leland v. Manning*, 4 Hun, 7. In an action upon a purchase-money mortgage, given by an executor, as such, it is unnecessary to allege the time and manner of his appointment. *Skelton v. Scott*, 18 Hun, 375; *Kingsland v. Stokes*, 58 How. 1, S. C. 61 How. 494. Styling the plaintiffs "executors" is not, however, a sufficient averment of their title. *Forrest v. New York*, 13 Abb. 350. A good pleading, however, is not rendered demurrable because it unnecessarily describes plaintiff as an executor, but does not allege his appointment. *Murray v. Church*, 1 Hun, 49, affirmed, 58 N. Y. 621. A declaration stating a promise by the testator in his lifetime, and by the defendant, "administrator as aforesaid," after his decease, is tantamount to an averment of a promise by the defendant "as" administrator. *Carter v. Phelps*, 8 Johns. 440. The complaint of an administratrix, suing in her representative capacity upon a non-negotiable note, alleged to have been delivered to her intestate, need not allege that the note is in her possession; if the plaintiff or her intestate had parted with it, defendant must show the fact. *Cordier*

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v. Thompson, 8 Daly, 172. An action against executors, where they are sued "as executors," and not merely described as such, cannot be converted into one against the defendants individually without amendment. *Austin v. Muuro*, 47 N. Y. 360. A complaint against executors, seeking to charge them in their representative capacity, cannot be sustained on demurrer if the facts alleged show only a personal liability on their part. *Bartlett v. Hatch*, 17 Abb. 461.

Under a complaint, alleging the death of intestate and due and legal appointment of administrator, the letters of administration are sufficient to prove the allegation. *Belden v. Mecker*, 47 N. Y. 307; *Parham v. Moran*, 7 Hun, 717, affirmed, 71 N. Y. 596; *Farley v. McConnell*, 7 Lans. 428, affirmed, 52 N. Y. 630. Letters granted after suit may be given in evidence to sustain allegation of representative capacity. *Osgood v. Franklin*, 2 Johns. Ch. 1, affirmed, 14 Johns. 527; *Maloney v. Woodin*, 11 Hun, 202. Under a complaint in foreclosure, which alleges that defendant, as executor and trustee, executed the bond and mortgage, but in no other way alleging plaintiff's appointment as executor, plaintiff may prove the making and delivery of the mortgage, and any facts proving defendant's appointment and authority. *Kingsland v. Borst*, 14 Week Dig. 114. A complaint which alleges that defendant, in fraud of plaintiff's intestate and of his creditors, induced the intestate to execute a bill of sale to him, and had under it converted the property, does not state a cause of action to set aside the sales as made with intent to defraud creditors of deceased, but one merely to recover the property for the benefit of his estate. *Curry v. Brockway*, 12 Daly, 17. On a complaint against a foreign administrator averring that he is about to remove assets of the estate from the State, a demurrer on the ground that the court has no jurisdiction of the person of defendant or of the subject-matter is well taken. *Hankinson v. Page*, 3 How. (N. S.) 323. After the issue of letters, with the will annexed, upon the estate of one who has died in a foreign country, the validity of the will cannot be attacked by one against whom an action is brought for a debt due the estate. *Sullivan v. Fosdick*, 10 Hun, 173. It is no defence to an action brought by an administrator that the proper parties were not cited on his appointment. *James v. Adams*, 22 How. 409. As to what is a proper set-off, see *Patterson v. Patterson*, 59 N. Y. 574. Objection

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that a judgment in an action against an executor as such is not in proper form, cannot be taken for the first time on appeal. *De Vallette v. Wendt*, 75 N. Y. 579. An administrator is not bound to interpose a plea of usury or illegality of the contract. *Chase v. Hinman*, 8 Wend. 452. As to form of judgment, see *Alger v. Conger*, 17 Hun, 45.

In an action against an executor upon a disputed claim, apparently barred by the statute of limitations, the plaintiff may prove matter in avoidance of the statute, although not pleaded. *Minsheimer v. Bruns*, 1 App. Div. 324, 37 N. Y. Supp. 261, 72 St. Rep. 586.

ARTICLE II.

ACTION BY LEGATEE AGAINST EXECUTOR AND ITS EFFECT.

§§ 1819, 1820, 1821.

§ 1819. Action by legatee, etc., against executor, etc.

If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy, or distributive share, the person entitled thereto may maintain such an action against him, as the case requires. But for the purpose of computing the time, within which such an action must be commenced, the cause of action is deemed to accrue when the executor's or administrator's account is judicially settled, and not before.

§ 1820. Id.; by infant; guardian's bond.

The guardian ad litem of an infant, in whose favor an action is brought, as prescribed in the last section, must, unless he is also the general guardian, execute and file with the clerk, before the commencement of the action, a bond to the infant, with at least two sufficient sureties, in a penalty fixed by a judge of the court, conditioned that the guardian will duly account to the infant, when he attains full age, or, in case of his death, to his personal representatives, for all money or property, which the guardian may receive, by reason of the legacy or distributive share.

§ 1821. When action barred by judgment against heir, etc.

A final judgment against an heir or devisee bars an action against the executor or administrator of the decedent, for the same cause, and every other remedy to enforce payment thereof out of the decedent's property, unless an execution against property, issued upon the judgment, has been returned wholly or partly unsatisfied, or sufficient real property to satisfy the judgment has not descended, or been devised, to the judgment debtor. But, if the judgment was recovered for a debt or legacy, expressly charged upon the estate descended or devised, the bar is absolute.

A legatee can sue for his legacy without joining other legatees, unless he is a residuary legatee. *Cromer v. Pinckney*, 3 Barb. Ch.

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466. But otherwise as to a residuary legatee. *Tonnelle v. Hall*, 3 Abb. 205; *Trustees Auburn Theological Seminary v. Kellogg*, 16 N. Y. 83. And where the fund is insufficient to pay in full, all interested should be made parties. *Towner v. Tooley*, 38 Barb. 598. A legatee may sue to recover specific securities given him by legacy. *Sere v. Coit*, 5 Abb. 481. The mere failure of an executor to pay to a legatee the full amount of his legacy will not, in absence of proof of improper conduct, authorize an action to be brought against him individually therefor. *Hurlbut v. Durant*, 21 Hun, 481. In an action for a legacy, which is alleged to have been paid to a stranger, the latter is not a necessary party. *Gleason v. Thayer*, 24 Barb. 82. A legatee, as such, cannot maintain an action against a debtor of the testator. *Whitney v. Coapman*, 39 Barb. 482. Where the executor of a debtor's estate is also administrator of the creditor's estate, a legatee may maintain an action for the construction of the wills, an accounting and the payment of his legacy, joining other creditors having claims of equal degree, but the executor of the debtor's estate must be distinctly made a party as such. *Fisher v. Hubbell*, 7 Lans. 481. An action at law lies for a legacy if the devisee has entered and promised to pay. Past payment is conclusive evidence of such promise. *Beecker v. Beecker*, 7 Johns. 99; *Van Orden v. Van Orden*, 10 Johns. 30; *Kelsey v. Deyo*, 10 Cow. 133; *Tole v. Hardy*, 6 Cow. 333. There is no statute of limitations relating to charges on real estate for the payment of legacies. *Shannon v. Strader*, 36 Hun, 47. In *American Bible Society v. Hebard*, 51 Barb. 552, it was held, that where more than six years had elapsed since the expiration of the year after the granting of letters, the claim of the legatee was barred by statute of limitations.

In *Cole v. Terpenning*, 25 Hun, 483, it was held that the statute of limitations ran against a petition to compel an executor to account; the petition in this case was filed before the Code went into effect. In *Estate of Collins*, 6 Civ. Pro. R. 84, it is held that since § 1819 provides that the right to bring an action to recover a distributive share is not deemed to accrue until the accounts of the executor have been judicially settled, a proceeding for an accounting is not barred by the statute of limitations. The remedy, under this section, is not barred until at least six years after the judicial settlement of the executor's account. *Quackenbush v. Quackenbush*, 42 Hun, 329. It is held, however,

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in *Matter of Van Dyke*, 44 Hun, 394, that this section was intended to apply to actions only, and not to special proceedings, and it effected no change in the law prescribing the time within which proceedings to compel an executor or administrator to account before a surrogate must be commenced. In *Drake v. Wilkie*, 30 Hun, 537, it is held that when a proceeding was taken in Surrogate's Court to compel payment of legacy, and six years had not elapsed from the time legatee had knowledge of the facts upon which his right to make a demand of payment depended, the proceeding was not barred by the statute of limitations. This section did not take effect until September 1, 1880, and does not aid cases where the statute of limitations had then run. *Gunn v. Fellows*, 4 St. Rep. 155. Interest is allowable upon general legacies only from the expiration of one year from the time letters testamentary are granted. *Kerr v. Dougherty*, 17 Hun, 341.

But where a legacy to an infant, as to whom the testator is *in loco parentis*, is made payable when the infant becomes of age, and such legatee has no other provision in his lifetime, or any maintenance allotted by the will, the legacy carries interest from the time of the death of the testator. It is not needed from the application of the rule that the testator should have been under a legal obligation to support the legatee. It is sufficient that he has voluntarily assumed such a relation. The general guardian of an infant legatee can maintain an action to recover a legacy bequeathed to the infant by the will of the defendant's testator. *Thomas v. Bennett*, 56 Barb. 197; *Haucenstein v. Kull*, 59 How. 25; *Coakley v. Mahar*, 36 Hun, 157; *Bayer v. Phillips*, 10 Civ. Pro. R. 227; *Perkins v. Stimmel*, 42 Hun, 520. It is not necessary to allege that the Surrogate's Court has made an order that the legacy should be paid to plaintiff, or that the plaintiff has given security required to be given to entitle him to receive a legacy in a proceeding before the surrogate, or that it has not been paid into Surrogate's Court. *Wall v. Bulger*, 46 Hun, 346. Such an action, while pending and undetermined, is a bar to a proceeding in Surrogate's Court to compel payment of a legacy. *Lewis v. Maloney*, 12 Hun, 207; *Pittman v. Johnson*, 35 Hun, 41, affirmed, 102 N. Y. 742. As to when statute of limitations begins to run, see *Estate of Thomas*, 8 St. Rep. 453.

One of two claimants to a specific legacy is not bound by a judgment in an action to which he is not a party, against the ex-

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ecutors of the will, to recover the same legacy for the estate of the other claimant. The executors do not, in such an action, represent the absent claimant, as they are simply stakeholders as to the legacy, and the estate is not increased or diminished by the determination of the controversy between the parties; so held where one of the defendant's executors in the former action was also a co-plaintiff, being an executor of the will of the deceased legatee under the latter will, and, therefore, the person chiefly interested in sustaining the judgment in favor of the plaintiffs in that action. *Weeks v. Weeks*, 16 Abb. N. C. 143. It is no defence to an action, under this section, that the executor has paid the legacy to another person. *Weeks v. Ostrander*, 52 Super. Ct. 512. The Supreme Court has concurrent jurisdiction with the Surrogate's Court to enforce the payment of legacies, and an action for that purpose, while pending under this section and undetermined, bars a proceeding for an accounting before the surrogate. *Wall v. Bulger*, 12 St. Rep. 215; *Lewis v. Maloney*, 12 Hun, 207.

Where an account shows that various payments must be made before a residuary legatee's interest can be ascertained, such interest is not barred, although the will was probated more than twenty years before the accounting. *Matter of May*, 9 Supp. 785.

The effect of § 1819 is considered in *Butler v. Johnson*, 111 N. Y. 204, affirming same case, 41 Hun, 206.

Provisions of § 1819, giving legatees and next of kin one year after judicial settlement of an account to bring suit against an executor, if he refuses to pay on demand, apply only to action and does not give a legatee right to cite the executor to account in a Surrogate's Court after the statute of limitations has run against the legacy. The provision of the statute of limitations which declares that in case of fiduciary capacity, where a demand is necessary, the statute is to be computed from the time the party had actual knowledge of the facts, does not apply as between the executor and legatees or next of kin. *Matter of Dunham*, 22 Abb. N. C. 479, following *Matter of Van Dyke*, 44 Hun. 394. Where in an action to recover a balance of a legacy which is alleged to be due and to have been demanded, defendant denied that said alleged balance had been demanded as alleged in the complaint, it was held that this raised an issue which must be tried. *Kennagh v. McGolgan*, 21 St. Rep. 326.

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Section 1819 applies to all cases except where the statute of limitations had accrued before its passage. *Matter of May*, 31 St. Rep. 50, citing *Estate of Van Dyke*, 7 St. Rep. 710.

The meaning of the section is construed in *Matter of Hodgman*, 31 St. Rep. 479, discussing *Butler v. Johnson*, 111 N. Y. 204; *Matter of Latz*, 33 Hun, 618, and numerous other authorities.

This section does not embrace special proceedings, but relates to actions only. *Matter of Perry*, 37 St. Rep. 576, 15 Supp. 535; *Matter of Nicholls*, 8 Supp. 7.

The exception in favor of a legatee or distributee is the only one to the rule that the statute of limitations is a bar to the right of a creditor to compel an executor or administrator to account after six years have elapsed since the right to compel such accounting accrued. *Matter of Kirkpatrick*, 9 Misc. 228.

ARTICLE III

LIMITATION OF ACTION BY CREDITOR ON REJECTED CLAIM.

§§ 1822.

§ 1822. [Am'd, 1895.] **Limitation of action by creditor on claim rejected, etc.**

Where an executor or administrator disputes or rejects a claim against the estate of a decedent, exhibited to him, either before or after the commencement of the publication of a notice requiring the presentation of claims, as prescribed by law, unless a written consent shall be filed by the respective parties with the surrogate that said claim may be heard and determined by him upon the judicial settlement of the accounts of said executor or administrator as provided by section twenty-seven hundred and forty-three, the claimant must commence an action for the recovery thereof against the executor or administrator, within six months after the dispute or rejection, or, if no part of the debt is then due, within six months after a part thereof becomes due; in default whereof he, and all the persons claiming under him, are forever barred from maintaining such an action thereupon, and from every other remedy to enforce payment thereof out of the decedent's property.

§ 2718. [Am'd, 1893.] **Ascertainment of debts.**

The executor or administrator at any time after the granting of his letters, may insert a notice once in each week for six months in such newspaper or newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice. The executor or administrator may require satisfactory vouchers in support of any claim presented and the affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that there are no

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offsets against the same to the knowledge of the claimant. If the executor or administrator doubts the justice of any such claim, he may enter into an agreement in writing with the claimant to refer the matter in controversy to one or more disinterested persons, to be approved by the surrogate. On filing such agreement and approval in the office of the clerk of the supreme court in the county in which the parties or either of them reside, an order shall be entered by the clerk referring the matter in controversy to the person or persons so selected. On the entry of such order the proceeding shall become an action in the supreme court. The same proceedings shall be had in all respects, the referees shall have the same powers, be entitled to the same compensation, and subject to the same control as if the reference had been made in an action in which such court might, by law, direct a reference. In determining the question of costs the referee shall be governed by sections eighteen hundred and thirty-five and eighteen hundred and thirty-six of this act. Judgment may be entered on the report of the referee and such judgment shall be valid and effectual in all respects as if the same had been rendered in a suit commenced by the ordinary process, and the practice on appeal therefrom shall be the same as in other civil actions. If a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of such notice, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such suit was commenced.

The short statute of limitations is a highly penal provision and ought to be strictly construed. To bring a case within the statute it must appear that all its requirements have been strictly complied with. *Elliot v. Cronk's Adm'r*, 13 Wend. 35; *Broderick v. Smith*, 3 Lans. 26; *National Bank of Fishkill v. Speight*, 47 N. Y. 668; *Hoyt v. Bonnett*, 50 N. Y. 542. A mere verbal presentation of a claim is not a compliance with the provisions of the statute. *King v. Todd*, 27 Abb. N. C. 149, 21 Civ. Pro. R. 114; *Matter of Estate of Morton*, 7 Misc. 343; *Niles v. Crocker*, 88 Dun, 312.

Where the creditor has presented his claim, and the same has been rejected and six months have elapsed without the bringing of an action to enforce the same, as required by 2 R. S. 89, § 38, this is a defence not only to an action against the personal representatives of the deceased, but also to any action brought to enforce the claim against heirs at law or next of kin. It is not a valid objection to a notice of rejection of a claim, that it was signed by the attorney of the personal representatives, where it appears that it was so signed at their request and by their authority. It is in such a case their act and as effectually as if signed by them. *Sclover v. Coe*, 63 N. Y. 438. This section takes the place of § 38, *supra*. It was held in *Field v. Field*, 77 N. Y. 294, before the Code, that claims against an estate might

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be presented at any time after executors qualify and enter upon the discharge of their duties; and when in the discharge of their duties they examine and decide upon the justice of a claim presented, although no notice to creditors has been published, the effect of their decision is the same as though the claim was presented. It does not affect the question of costs whether claim is presented before or after such publication; although *In re Haxton*, 1 St. Rep. 164, reversing 33 Hun, 364, it is said that before the amendment of 1882 it was held that the statute did not apply except to claims presented after commencement of publication by the executor of the notice to creditors, citing *Whitmore v. Foose*, 1 Den. 159, and *Tucker v. Tucker*, 5 N. Y. 108. After the commencement and before the completion of the publication of notice to creditors to present a claim, plaintiff presented a claim, which was rejected. *Held*, that an action brought more than six months after rejection was barred. *Cramer v. Bedell*, 10 St. Rep. 817. See *Cornes v. Wilkin*, 79 N. Y. 129, holding that knowledge on part of executor of existence of claim does not dispense with its presentation. The party seeking to use the statute as a defence must show strict compliance with it. *Magee v. Vedder*, 6 Barb. 352. The same rule is held in *Lambert v. Craft*, 98 N. Y. 342, where it is said that if, after due presentment and reasonable opportunity to examine a claim, it is not disputed, or no offer of reference is made, it acquires the character of a liquidated claim against the estate. In *Hoyt v. Bonnett*, 50 N. Y. 538, good faith is required from the executor, and if he desires to reject, it is said his rejection to set the statute in operation must be decided, unequivocal and absolute. The Surrogate's Court has jurisdiction to determine whether the demand of a creditor, claimed by an executor or administrator to be barred by this section, has, in fact, been disputed or rejected within the meaning of that section. *Estate of Lange*, 3 How. (N. S.) 162, citing *Hoyt v. Bonnett*, 50 N. Y. 538; *Ruthven v. Patten*, 2 Abb. (N. S.) 121; *Lambert v. Craft*, 98 N. Y. 342. The provisions of this section, as amended in 1882, do not apply in favor of decedent's representatives who have omitted to publish the notice required by it. *Salomon v. Heichel*, 4 Dem. 176. The questions arising as to publication of notice to creditors, and its effect, with the statute as to references of claims against estates and what constitutes a rejection of a claim, as well as the procedure on

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such reference, are fully treated in *Fiero on Special Proceedings* (first edition) at page 565, etc., and the authorities are cited and precedents given.

Where publication of notice is not shown it does not aid the executor. *Broderick v. Smith*, 3 Lans. 26. If a creditor presents his claim and it is rejected, he must sue within six months if not referred, or be barred; or if he fails to present it, he may sue at any time before the statute of limitations attaches, but he can have no costs. *Cotter v. Quinlan*, 2 Dem. 29; *Baggott v. Boulger*, 2 Duer, 160; *Green v. Day*, 1 Dem. 45. An order to present claims to another person than the executor or administrator is not valid. *Hardy v. Ames*, 47 Barb. 13; *Whitmore v. Foose*, 1 Den. 159. Contingent claims may be presented. *Hoyt v. Bonnett*, 50 N. Y. 538; *Sclover v. Coc*, 63 N. Y. 438. Where a duly verified claim is presented to an executor or administrator, he must either admit or reject it within a reasonable time or he will be presumed to have admitted it. *Underwood v. Newburger*, 4 Redf. 499.

Oral negotiations between the parties in relation to a reference after a rejection of a claim, where it does not result in a written agreement, it does not constitute a waiver of the statute of limitations. *Snell v. Dale*, 43 St. Rep. 498, 17 Supp. 575.

The section includes claims which are contingent as well as those where the liability is certain and fixed. *Cornes v. Wilkin*, 79 N. Y. 129, affirming 14 Hun, 428.

The fact that an executor enters into an agreement under the statute after a claim is barred under this section does not prevent him from interposing the statute as a defence. *Flynn v. Dieffen-dorf*, 51 Hun, 194.

Where there is a stay by order of the court under § 406 of the Code, the time during which said order stands is not part of the time limited for the commencement of an action against an executor under this section. *Wilder v. Ballou*, 63 Hun, 118. In *Peters v. Stewart*, 2 Misc. 357, it was held that a statement of the person presenting the claim that it was rejected, followed by leaving the written notice at the residence of the claimant, was sufficient.

This section does not affect a claim against the estate of the decedent upon which a judgment was obtained in the lifetime of the decedent. *Estate of Lyman*, 20 Civ. Pro. R. 421, citing *McNulty v. Hurd*, 72 N. Y. 518. Where a claim consisting of independent items is presented to the representative of a dece-

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dent, one item may be admitted and the remainder rejected, so as to set the short statute of limitations running as to those rejected. The short statute begins to run against a claim although no notice to creditors has been published where he has presented a claim. Where an executor directs an attorney to reject a claim against an estate, the rejection by him is as effectual as though the executor notified the claimant in person. *Wintermeyer v. Sherwood*, 23 Civ. Pro. R. 422, 77 Hun, 193, 28 Supp. 449, citing *Selover v. Coc*, 63 N. Y. 438; *Field v. Field*, 77 N. Y. 294.

In *Tyrack v. Brumley*, 1 Barb. 519, it was held that it would be presumed the attorney for the executor was authorized to refuse to refer the claim, notwithstanding the executor denied such authority, where it appeared he was his counsel in all matters relating to the estate. See, also, *Clark v. Corwin*, 21 Civ. Pro. R. 108, as to what constitutes rejection of a claim. Where it was not clear that the claimant understood from what was said by the executor, that his claim was rejected, it was held that the executor could not rely on such a conversation as a legal rejection within the meaning of the statute, particularly as the executor himself subsequently served a formal rejection of the claim. *Matter of Miller*, 27 St. Rep. 784, 9 Supp. 60, citing *Hoyt v. Bonnett*, 50 N. Y. 538.

Notice of rejection of a claim need not be in writing or any particular form. When the executor immediately disputes and rejects it and so informs the bearer, that is sufficient to set the statute of limitations running. *Peters v. Stewart*, 51 St. Rep. 120, 21 Supp. 993, reversing 48 St. Rep. 511, 20 St. Rep. 661; see *Titus v. Poole*, 14 Supp. 678.

In *Hayden v. Pierce*, 144 N. Y. 512, 64 St. Rep. 42, it was held that where it appeared that the executor was at the time of the death of the deceased and ever since has been a resident of another State, although the action was not brought within six months after the rejection of the claim, the action was not barred.

It is not essential to the validity of the claim against the estate of a deceased person that it be stated with legal precision; it is sufficient if the transaction out of which the claim arises is identified, its general character indicated without technical formality and the amount of the claim stated. A party presenting such a claim, which is rejected, cannot evade the statute of limitations, § 1822, by the successive presentation of claims founded on the

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same transaction and varying in form or detail. *Titus v. Pool*, 145 N. Y. 414, affirming 73 Hun, 383, 65 St. Rep. 344.

Although a claim arising after the death of the decedent is not governed by the same rule as one arising under a contract made by executors or administrators upon a new and independent consideration, yet the object of the statute of limitations is to facilitate the early settlement of estates and should be held applicable to a claim for funeral expenses, at least in a case where the claimant had elected to present his claim to the administrators, with will annexed, after they had advertised for claims. *Koons v. Wilkins*, 2 App. Div. 13.

Executors have no authority to allow a claim which is barred by the statute of limitations. *Matter of Oosterhoudt*, 15 Misc. 566, 38 N. Y. Supp. 179, 72 St. Rep. 808.

ARTICLE IV.

JUDGMENT AND EXECUTION AGAINST EXECUTORS. §§ 1823, 1825, 1826, 1827.

§ 1823. Decedent's real property not bound by judgment against executor, etc.

Real property, which belonged to a decedent, is not bound, or in any way affected, by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof.

§ 1825. Leave to issue execution against executor, etc.

An execution shall not be issued, upon a judgment for a sum of money, against an executor or administrator, in his representative capacity, until an order permitting it to be issued has been made by the surrogate from whose court the letters were issued. Such an order must specify the sum to be collected, and the execution must be indorsed with a direction to collect that sum.

§ 1826. Id.; how procured; order; and contents thereof.

At least six days' notice of the application for an order specified in the last section, must be personally served upon the executor or administrator, unless it appears that service cannot be so made with due diligence; in which case notice must be given to such persons, and in such manner as the surrogate directs, by an order to show cause why the application should not be granted. Where it appears that the assets, after payment of all sums chargeable against them for expenses, and for claims entitled to priority as against the plaintiff, are not, or will not be, sufficient to pay all the debts, legacies or other claims of the class to which the plaintiff's claim belongs, the sum, directed to be collected by the execution shall not exceed the plaintiff's just proportion of the assets. In that case, one or more orders may be afterwards made in like manner, and

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one or more executions may be afterwards issued, whenever it appears that the sum directed to be collected by the first execution is less than the plaintiff's just proportion.

§ 1827. Security may be required from a legatee.

Where a judgment has been rendered against an executor or administrator, for a legacy or distributive share, the surrogate, before granting an order permitting an execution to be issued thereupon, may, and in a proper case must, require the applicant to file in his office an undertaking to the defendant, in such a sum and with such sureties as the surrogate directs, to the effect that if, after collection of any sum of money by virtue of the execution, the remaining assets are not sufficient to pay all sums for which the defendant is chargeable for expenses, claims entitled to priority as against the applicant, and the other legacies or distributive shares, of the class to which the applicant's claim belongs, the plaintiff will refund to the defendant the sum so collected, or such ratable part thereof, with the other legatees or representatives of the same class, as is necessary to make up the deficiency.

An action based upon a judgment, rendered against executors in their representative capacity, is not maintainable to set aside, as fraudulent against creditors, a conveyance of real estate made by decedent. The judgment is not a lien upon the land, and so it may not be sold under an execution issued thereon. The conveyance, therefore, is no obstruction to any lien the judgment-creditor has, or to the enforcement of any execution issued upon his judgment. It seems it is the duty of the executors, in case of such fraudulent conveyance, where there are not assets sufficient to pay the debts, to retain the land for the benefit of all the creditors under chapter 314, Laws 1858, and no one creditor can appropriate it for his own benefit; an executor can be compelled to bring such an action by the surrogate, and it is no bar to such relief that one of the executors is the fraudulent grantee. *Lichtenberg v. Herdtfelder*, 103 N. Y. 203. A judgment recovered against executors does not become a lien upon the real estate of their testator. It is not even evidence against the persons entitled thereto, and in no way binds them. *Platt v. Platt*, 105 N. Y. 496, citing *Ferguson v. Brooms*, 1 Bradf. 10; *Dodge v. Thompson*, 13 Week. Dig. 104; *Sharpe v. Freeman*, 45 N. Y. 802; *Dodge v. Stevens*, 94 N. Y. 209. An execution cannot issue against a decedent's real property on a judgment against his personal representatives. *James v. Beesley*, 4 Redf. 236.

The real property of a decedent is not bound or in any way affected by the judgment against his executor or administrator, and is not liable to be sold by virtue of an execution thereon,

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unless by the specific terms of the judgment affecting the particular property. *Hoxie v. Kennedy*, 15 Civ. Pro. R. 185.

A judgment recovered against executors for work and materials furnished under a contract with them for improvements upon a parcel of property of the estate other than that foreclosed, is not a lien upon and is not payable out of the surplus moneys arising on a sale in foreclosure. *Mander v. Lowe*, 12 Misc. 316, 24 Civ. Pro. R. 368, 67 St. Rep. 544, citing *In re Hledra Estate*, 23 Supp. 842.

Under §§ 1825 and 1826, the surrogate has no power to permit an execution against real estate. *Matter of Jansen*, 9 Supp. 451.

Executions can only be issued on judgment by leave of the surrogate, and only for such a sum as is properly applicable thereon from the estate. *Matson v. Abby*, 53 St. Rep. 794, 70 Hun. 475.

Before an execution issues it should appear there were assets sufficient to pay all the debts of the decedent, or there should be a direction that a just proportion of the assets be applied to payment of the judgment. *Matter of Boyle*, 29 St. Rep. 946, citing *Sippel v. Macklin*, 2 Dem. 219; *Peters v. Carr*, 2 Dem. 22.

The proceeding to obtain an order to issue execution in such case seems necessarily to involve an accounting of some kind, for it is necessary to show that the executor has assets above expenses and above prior claims, and also what is plaintiff's just proportion of such assets. *Matter of Hodgman*, 31 St. Rep. 479.

This provision of the Code does not authorize supplementary proceedings upon a judgment. *Collins v. Beebe*, 27 St. Rep. 4.

In *Columbus Watch Co. v. Hodenpyl*, 48 St. Rep. 446, §§ 1825 and 1826 of the Code were construed in connection with § 1371.

The codifiers say that § 1826 completes the general scheme for the recovery and collection of debts, which they proposed in lieu of the old system, and that an attempt has been made to render the actual issue of an execution unnecessary in a majority of cases. Petition for leave to issue execution must be verified—*Matter of Howell*, 2 Redf. 299—and must contain allegation of existence of assets applicable to the judgment. *Melcher v. Fisk*, 4 Redf. 22. Where sufficient assets clearly appear, the surrogate should allow execution to issue. *Smith v. Howell*, 2 Redf. 325. It was held, in *Matter of Nichols*, 4 Redf. 228, that on inquiry arising as to amount of assets in hands of executor, fees paid his counsel in the action could not be deducted; and a like rule is held in

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Field v. Field, 2 Redf. 160. It was held, under like provision of Revised Statutes, that though the surrogate had power to allow execution to issue without an accounting, that such permission ought not to be granted, except some sort of an accounting had been made or satisfactory evidence given that there were assets in the hands of the executor applicable to the judgment. It is better practice to allege in the petition existence of assets, and if not alleged, the failure of the executor to deny that fact will not be an admission of assets. *Melcher v. Fisk*, 4 Redf. 36; *Hauselt v. Gaus*, 1 Dem. 36; *Peters v. Carr*, 2 Dem. 22. Personal representatives and parties in interest are entitled to notice of an application to issue execution. *Marine Bank of Chicago v. Van Brunt*, 49 N. Y. 160. The creditor need not ask for an accounting where one has been rendered. *Smith v. Howell*, 2 Redf. 325. An execution issued under § 2554, upon a decree of a Surrogate's Court, does not require leave of the court. *Peyser v. Wendt*, 2 Dem. 221; *Joel v. Bitterman*, 2 Dem. 242. The provisions of 2 R. S. 116, §§ 19, 20, 21, regarding the issuing of executions on judgments obtained against "any executor or administrator, after a trial at law," relate only to cases where such representative has disputed the debt, and subjected the creditor to a litigation; no preference is given to the judgment-creditor, and execution, if one is permitted, is to be paid only in the proportion paid to other creditors. *Schmidt v. Langhaar*, 88 N. Y. 503.

It is not an answer for the representative to allege that he has not in hand money to pay the claim, for he may have part of it; he must state the amount of assets of the estate, their condition, expenses and state of the fund. *Estate of Wilson*, 3 Law Bull. 87; *Keyser v. Kelly*, 4 Redf. 157. The surrogate cannot receive evidence as to the legality or propriety of the judgment. *Freeman v. Nelson*, 4 Redf. 374; *Glacius v. Fogel*, 4 Redf. 516; *Keyser v. Kelly*, 4 Redf. 157. Motion papers, to set aside an order granting leave to issue an execution against an executor, may be served on the attorney, where the judgment-creditor is a non-resident. *Matter of McCann*, 4 Redf. 115. A surrogate's order granting leave to issue execution against executors is a sufficient adjudication of the existence of assets. *Matter of Clark*, 2 Abb. N. C. 208. These provisions are inapplicable to a judgment in an action originally commenced against a decedent. *Thatcher v. Bancroft*, 15 Abb. 243.

Art. 4. Judgment and Execution against Executors.

As to the necessity for leave of surrogate and order of court to authorize issuing of execution against estate of a decedent before the Code, see *Marine Bank of Chicago v. Van Brunt*, 49 N. Y. 160. The permission of the surrogate need not precede the application to the Supreme Court; no notice need be given of the presentation of the proposed petition to the surrogate; upon its presentation, the surrogate must issue a citation to all parties interested, unless they appear voluntarily; in which case they will be bound by the decree, though no citations be issued. *Kerr v. Kreuder*, 28 Hun, 452. A judgment for money on a verdict recorded against decedent in his lifetime is entitled to preference. *Matter of Dunn*, 5 Redf. 27. No execution can issue without leave of the surrogate, from whose court letters were issued, and such execution is of little avail, as no preference is given among creditors, and execution, if permitted, is to be paid only in the proportion paid to other creditors. *Cook v. Ryan*, 29 Hun, 249. Executions authorized by these sections are only such as can be issued against personal assets, which are in the possession or under the control of the executors or administrators, and have no relation whatever to real estate. *Lichtenberg v. Herdtfelder*, 103 N. Y. 302. Judgment against executors can only be enforced by execution when allowed by the surrogate. *Syms' Executor, etc., v. Mayor of New York*, 105 N. Y. 153. An appeal from a judgment granted against an executor in his representative capacity is no bar to a motion for leave to issue execution. No undertaking having been given on appeal, the matter is governed by § 1351. *Estate of Morey*, 10 St. Rep. 693. See *Keyser v. Kelly*, 4 Redf. 157.

It was held before the present Code that a surrogate had the same power to direct execution on a judgment obtained against a personal representative for liabilities incurred by him in administering the estate that he had to order such process to issue on a judgment for a debt owing by deceased, and such a judgment had a preference. *Matter of Thompson*, 41 Barb. 237. An order granting leave to issue execution against an executor cannot be reviewed on appeal, unless the appellant gives security for the sum to be levied, with interest and the costs of appeal. It seems the making of such an order is in the discretion of the surrogate. *Mount v. Mitchell*, 31 N. Y. 356. In *St. John v. Voorhes*, 19 Abb. 53, it is held that, if there are no assets on the accounting,

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the surrogate cannot allow execution, and to do so is error. The issuing of an execution against executors, describing them in their representative capacity, is sufficient to prevent the sheriff from levying on their individual property. *Olmstead v. Vredenberg*, 10 How. 215. An executor who had exhausted the estate was held liable to pay a creditor for a deficiency in foreclosure his *pro rata* share. *Glacius v. Fogel*, 88 N. Y. 434.

The surrogate cannot, under § 1826, authorize executions to issue on judgments against an executor, where the assets are sufficient to pay but a small proportion of the claims of the class to which such judgment belongs, and the court is unable to determine, from the evidence submitted, the amount for which execution should issue. *In re Hesdra Estate*, 23 Supp. 842.

See § 1376 as to when a writ of possession may be granted on a judgment for the recovery of real property against a person who has since died.

ARTICLE V.

MISCELLANEOUS PRACTICE REGULATIONS. §§ 1828-1834.

§ 1828. Actions, etc., when not to abate.

An executor, administrator, or a person appointed by the surrogate, as prescribed in chapter eighteenth of this act, to dispose of the real property of a decedent, is deemed a trustee, appointed by virtue of a statute, within the meaning of that expression as used in section 766 of this act.

§ 1829. Execution on former judgment.

An execution may be issued, in the name of an executor or administrator, in his representative capacity, upon a judgment recovered by any person who preceded him in the administration of the same estate, in any case where it might have been issued in favor of the original plaintiff, and without a substitution.

§ 1830. Action against executor, etc., who has been superseded.

If an executor or administrator is defendant in an action or special proceeding, pending when his powers cease, the plaintiff may, in a proper case, proceed therein against him, to charge him personally; but a judgment or other determination, thereafter rendered or made against him, is not of any force, as against the estate of the decedent, or a person succeeding to the administration thereof.

§ 1831. False pleading by executor, etc.

An executor or administrator cannot be made personally liable to the adverse party, for a debt or for damages, by reason of his having made a false allegation in pleading.

§ 1832. When inventory may be contradicted.

In an action or special proceeding, to which an executor or administrator is a party, wherein the question whether he has administered the estate of the dece-

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dent, or any part thereof, is in issue, or is the subject of inquiry, and the inventory of assets, filed by him, is given in evidence, either party may rebut the same, by proof, either

1. That any property was omitted in the inventory, or was not returned therein at its true value; or

2. That any property has perished, or has been lost, without the fault of the executor or administrator; or has been fairly sold by him, at private or public sale, at a less price than the value so returned; or that, since the return of the inventory, it has deteriorated or enhanced in value.

§ 1833. Liability for uncollected demands.

In such an action or special proceeding, the executor or administrator shall not be charged with a demand or right of action, included in the inventory, unless it appears that the same has been collected, or might have been collected, with due diligence.

§ 1834. The last two sections qualified.

The last two sections do not vary any rule of evidence respecting any proof, which an executor or administrator may now make.

Execution cannot issue upon a judgment after the death of the judgment-creditor. The remedy of the executor is properly to be brought by original action. *Thurston v. King*, 1 Abb. 126. Where a plaintiff dies after judgment, there is no party left who can make a motion for leave to issue execution on the judgment; the only remedy is an action by his legal representatives. *Wheeler v. Daken*, 12 How. 537; same rule, *Jay v. Martine*, 2 Duer, 654; *Freeland v. Litchfield*, 8 Bosw. 634. But see the following provision of the Code:

§ 1376. [Amended 1885, 1887.] Where the party recovering a final judgment has died, execution may be issued at any time within five years after the entry of the judgment, by his personal representatives, or by the assignee of the judgment, if it has been assigned, and the execution must be indorsed with the name and residence of the person issuing the same. And where a party, or one or more of several parties, against whom a judgment for the recovery of possession of real property has been obtained, has died, an order granting leave to issue and execute such execution or writ of possession may be granted upon giving twenty days' notice to the occupants of the lands so recovered, and to the grantees or devisees of said deceased or, if he died intestate, to the heirs at law of said deceased, said notices to be served in the same manner as a summons is directed to be served in an action in the supreme court.

As to this section, see *Duryea v. Botsford*, 24 Hun, 317; *Pardee v. Tilton*, 20 Hun, 76; *Kincaid v. Richardson*, 25 Hun, 237; *Walker v. Donovan*, 6 Daly, 522; *Crill v. Kornmeyer*, 56 How. 276.

The inventory is *prima facie* evidence of the amount of the estate in a case in which, on the trial, no objection was made to the rest of the inventory in evidence, and the objection that proper

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notice was not given, was not made until requests were made on the settlement of the case on appeal, and where the inventory was filed in 1869 and the proceedings for the accounting were commenced in 1893. *Matter of Shipman*, 82 Hun, 108.

Statements in the inventory are only presumptive evidence against the person filing it, they are simply *prima facie* evidence of the value of the assets, and the statute provides that such presumption may be overcome and the statements in the inventory explained. *Matter of Mack*, 13 Misc. 368.

The diligence required by § 1833 is such as a good business man would exercise in the management of his own property under like circumstances. An executor having notice that there is a debt due the estate, is bound to active diligence for its collection; he may not wait for a request from the distributees. In case the debt is lost through his negligence, he becomes liable as for a *devastavit*. It seems that if the case is one of such doubt that an indemnity is proper, he must at least ask for it; at any rate he takes the risk of showing that the debt was not lost through his negligence. The statute of limitations does not begin to run in favor of an executor, as against a claim for damages occasioned by his negligence in collecting a debt due the estate, from the time of the probate of the will, but at best only from the time of the loss. *Harrington v. Ketteltas*, 92 N. Y. 40.

It seems that §§ 1832, 1833, 1834, providing for a rebuttal of the inventory of a decedent's assets, in "a special proceeding to which the executor or administrator is a party, wherein the question whether he has administered the estate" is in issue, apply only to cases where the executor sets up what is equivalent to the former plea *plene administravit*, and not to an accounting; the question in the latter case being, not whether he has administered the estate, but how he has managed it. *Thorne v. Underhill*, 1 Dem. 306. See the provisions of § 2741 as to allowing executor for property perished or lost without his fault and in other cases.

In an action to recover unpaid annuities, where the trustees have made no investment of the fund, but it is doubtful whether they will be obliged to pay over the principal sum after the death of the annuitant, the trustees should not be required to make an actual investment, but it is sufficient to require them to give security for the payment of the annuity. *Thompson v. Hicks*, 1 App. Div. 275, 37 N. Y. Supp. 340, 72 St. Rep. 693.

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An executor cannot be heard to excuse non-compliance with a decree directing the payment of money by claiming that he has not the amount in his hands. *Matter of Waring*, 1 App. Div. 29, 36 N. Y. Supp. 529.

ARTICLE VI.

COSTS IN ACTIONS AGAINST EXECUTOR OR ADMINISTRATOR.
§§ 1835, 1836.

§ 1835. Costs; how awarded.

Where a judgment for a sum of money only is rendered against an executor or administrator, in an action brought against him in his representative capacity, costs shall not be awarded against him, except as prescribed in the next section.

§ 1836. [Am'd, 1895.] Id.; when awarded.

Where it appears in a case specified in the last section that the plaintiff's demand was presented within the time limited by a notice published as prescribed by law, requiring creditors to present their claims and that the payment thereof was unreasonably resisted or neglected, or that the defendant did not file the consent provided in section eighteen hundred and twenty-two within six months from the rejection thereof; the court may award costs against the executor or administrator to be collected either out of his individual property, or out of the property of the decedent, as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the supreme court, the facts must be certified by the judge or referee, before whom the trial took place.

Re-enactment substantially of 2 R. S. 90, § 41.

The act in reference to costs in suits against executors and administrators does not apply to such as were commenced against the decedent in his lifetime. *Lemen v. Wood*, 16 How. 285; *Tindall v. Jones*, 19 How. 469; *Benedict v. Caffé*, 3 Duer, 669; *Merritt v. Thompson*, 27 N. Y. 225. In such case plaintiff is entitled to recover costs against the estate. *Mitchell v. Mount*, 17 Abb. 213; *Lefever v. Van Vechten*, 3 How. 201. In an action against the representatives of a deceased joint debtor upon the insolvency of the survivor, in which the survivor is a co-defendant, plaintiff is entitled to costs. *Yorks v. Peck*, 9 How. 201. The act in relation to costs does not apply to interlocutory costs. *Hunt v. Connor*, 17 Abb. 466. In an action against executors for services rendered to them as such they are personally liable for costs. *Smith v. Patten*, 9 Abb. (N. S.) 205. To entitle a party to costs against an executor, he must bring himself strictly within the statute. *Swift v. Bair's Ex'r*, 12 Wend. 278; *Theriot v. Prince*, 12 How. 451. To lay a foundation for a judgment for costs

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against executors the claim presented and offered to be referred must be substantially the one on which plaintiff recovers. *Genet v. Binsse*, 3 Daly, 239. The fact that executors have never advertised for creditors does not entitle a creditor to recover costs against them. *Van Vleet v. Burroughs*, 6 Barb. 341; *Bullock v. Bogardus*, 1 Den. 276; *Snyder v. Young*, 4 How. 217.

Under § 317 of the old Code, costs were not recoverable against executors when they were exempted therefrom by the Revised Statutes. *Morgan v. Skidmore*, 3 Abb. N. C. 92, overruling *Fish v. Crane*, 9 Abb. (N. S.) 252, and *Murray v. Smith*, 9 Bosw. 689; same rule, *Keyser v. Kelly*, 43 Super. Ct. 22; *Howe v. Lloyd*, 2 Lans. 335. In determining whether an executor is liable for costs, the court may consider other circumstances than those which appeared on the trial. *Mescreau v. Ryers*, 12 How. 300. Costs cannot be given against an executor where the claim was not presented within the time required by law after publication of notice to creditors, though it arose after that period had expired. *Bradley v. Burwell*, 3 Den. 261. The provisions of the Revised Statutes regulating references of disputed claims by executor have not been repealed. *Young v. Cuddy*, 23 Hun, 249; appeal dismissed, 88 N. Y. 647. The refusal of an executor to refer a disputed claim entitles the claimant to costs as a matter of right, in case he recovers a judgment. *Roony v. Lenmon*, 3 Law Bull. 101; *Snyder v. Snyder*, 26 Hun, 324. Where the demand is admitted, but there are no assets, costs cannot be given on a refusal to refer. *Bullock v. Bogardus*, 1 Den. 276. Where a claim, duly verified, was presented to an executor, and was rejected, accompanied with a refusal to refer, the executor never having advertised for the presentment of claims against the estate of the testator, *held*, that the plaintiff, having recovered a verdict, was entitled to costs under §§ 1835 and 1836. *Brinker v. Loomis*, 5 St. Rep. 439.

It is entirely optional with the executors whether or not to agree to a reference, it involves the question only of delay and costs; where a demand exists in favor of the estate against the claimant exceeding his claim, it seems the proper course is for the personal representatives to bring an action, or put the claimant to an action. An affirmative judgment against the claimant cannot be rendered on a reference, and it is questionable whether the counter-claim can be divided, and the effect of a judgment in favor

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of the claimant, if the counter-claim is withheld or withdrawn, is doubtful. *Mowry v. Peet*, 88 N. Y. 453. Where an order was made imposing costs upon the estate for refusal of executor to refer, it was held that the question of fact as to whether or not there was such a refusal was for the Special Term, and that, as the executor was personally indemnified for costs he could not be heard to complain of absence of the certificate of the judge or referee who heard the case, as he was not injured. *Meltzer v. Doll*, 91 N. Y. 365. Two grounds are indicated in section 1836 on either of which costs may be allowed. First, a refusal to refer the claim being disputed. Second, an unreasonable resistance or neglect of payment. This must be taken with the qualification that where notice has been published the demand must have been presented within the time required by law. This was the settled law before the Code and has not been changed under the new Code. It was the legislative intent that where a notice is published as prescribed, in order that plaintiff shall recover costs upon a judgment for a sum of money, it is requisite that he shall first present his demand within the time limited by the notice. The first condition must be complied with and one of the subsequent conditions must also occur to entitle a plaintiff to costs. *Horton v. Brown*, 29 Hun, 654, distinguishing and explaining *Field v. Field*, 77 N. Y. 294. Same effect as to old Code are *Bullock v. Bogardus*, 1 Den. 276; *Bradeley v. Burwell*, 3 Den. 262; *Russell v. Lane*, 1 Barb. 519; *Fort v. Gooding*, 9 Barb. 371; *Buckhout v. Hunt*, 16 How. 407; *Snyder v. Young*, 4 How. 217; *Van Vleck v. Burroughs*, 6 Barb. 341; *Belden v. Knowlton*, 3 Sandf. 758; *Potter v. Etz*, 5 Wend. 74; *Nicholson v. Showerman*, 6 Wend. 554; *Carhart v. Blaisdell*, 18 Wend. 531; *Doan v. Hinc's Exr.*, 22 Wend. 639; *Knapp v. Curtiss*, 6 Hill, 386; *Gansevoort v. Nelson*, 6 Hill, 389; *Murray v. Smith*, 9 Bosw. 689; *Boyd v. Wilkin*, 23 How. 137; *Stephenson v. Clark*, 12 How. 282, same rule, *Kahnweiler v. Smith*, 6 St. Rep. 241; *Chesbro v. Hicks*, 66 How. 194. The granting of an extra allowance against executors depends upon the same inquiry as the question of the recovery of costs against them. *Niblo v. Binsse*, 47 Barb. 435. If an executor unreasonably refuse to allow a claim directed to be paid by his testatrix, and the whole claim is finally allowed, the plaintiff is entitled to costs and an allowance. *Darling v. Halsey*, 2 Abb. N. C. 105. The refusal, by an executor, to pay a claim largely in excess of

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a bill previously rendered, is not unreasonable so as to charge the estate with costs of an unreasonable defence. *Harrison v. Ayers*, 18 Hun, 366.

In a case where judgment was demanded for \$60,000 with interest and it was materially reduced on trial, and still more on appeal to General Term, it was held that there was no bad faith in the defence and much to justify the defence of the action, and an order granting costs to plaintiff was reversed. *Johnson v. Myers*, 103 N. Y. 666. It is not an unreasonable resistance of a claim which was barred by the statute of limitations, unless there had been a payment thereon by the deceased, whose estate the executor represented, and of which he had no personal knowledge, to require the proof thereof to be submitted to a court, in an action in which he voluntarily appeared, in order that no charge of want of fidelity to the estate could be made. *Chesebro v. Hicks*, 66 How. 194. Where plaintiff's attorneys pressed a claim, and defendants having had every opportunity to refer before the commencement of the action, they not having taken steps to secure a proposed reference, the plaintiff, on succeeding, was held entitled to recover his taxable costs and disbursements. *Wilkinson v. Littlewood*, 67 How. 474. In the absence of evidence to show that a claim is unreasonably resisted or neglected, the executors are not chargeable with costs. *Fredenburgh v. Biddlecombe*, 17 Week. Dig. 25. Where the controversy turned on the method of computing interest, *held*, an order for costs and disbursements was proper. *Hyland v. Carpenter*, 20 Week. Dig. 261. Where a claim is reduced one-third, no costs should be allowed against an executor either below or on appeal. *Webster v. Nichols*, 21 Week. Dig. 566. See, also, *Daggett v. Mead*, 11 Abb. N. C. 216.

In an action against an administrator upon a debt incurred by the intestate, costs are not a matter of right, and a certificate therefor is required and should not be granted where but a small percentage of the claim is recovered. *Sutton v. Newton*, 22 Week. Dig. 140. The right of the court, under § 1836, to allow costs to plaintiff in an action against executors or administrators upon a claim against the estate, where they have refused to pay the claim, or any part of it, is not affected by the fact that the amount claimed in the account presented was larger than the amount claimed in the complaint, or that the latter claim was larger than the recovery. If

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it was the same claim for the same services and disbursements, the administrators were in no way misled or prejudiced by the amount. Where it appears that upon the presentation of the claim the administrators not only refused to pay but also to refer, it is not essential to show, to entitle plaintiff to costs, that after the refusal he made an offer of reference before the commencement of the action. *Carter v. Beckwith*, 104 N. Y. 236. The question of costs against executors and administrators is fully considered, in respect to what constitutes an unreasonable resistance on their part and as to when costs will be allowed, in *Fiero on Special Proceedings* (first edition), chapter xxv, at page 578, under reference of claims against estates, where a full citation of cases bearing on the subject is given.

The provisions of § 317 of the Code of Civil Procedure were not repealed by chapter 245, Laws of 1880, and upon the reference of a disputed claim against an estate under the provisions thereof, the disbursements of the claimant may be allowed, although no costs were granted. Chapter 686 of the Laws of 1893 has not changed the existing law. So held *Outhouse v. Odell*, 84 Hun, 494, 24 Civ. Pro. R. 289, 65 St. Rep. 593. *Benedict v. Sliter*, 82 Hun, 190, 64 St. Rep. 1, holds that where a referee, after the enactment of chapter 686 of the Laws of 1893, awarded costs to a claimant against the administrator of an estate, it must be assumed that he was of the opinion that the claim was unreasonably resisted or neglected and that he based such opinion upon the facts which appeared upon the trial.

Where a referee to whom a disputed claim against the estate of a decedent was referred, finds, as matter of fact, that payment of the claim has been unreasonably resisted by the executors or administrators of such decedent, such finding justifies the awarding of costs to the plaintiff under §§ 1835 and 1836 and 2718. *Ellis v. Filon*, 85 Hun, 485, 66 St. Rep. 764.

An action brought in the name of an administrator claiming to recover as such upon a cause of action arising after the death of the decedent, although concerning the property of the deceased, is an action in favor of the administrator individually, and he is liable for costs if he is defeated in the action, and in a clear case a judgment may be entered against him for costs without application to the court. *Mullen v. Guinn*, 88 Hun, 128, 68 St. Rep. 680.

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Two things are necessary to entitle the plaintiff to costs: First, demand must be presented during the time limited by a notice published as prescribed by law; and, second, the demand must be unreasonably resisted or neglected. The right of a prevailing party upon a reference of a disputed claim under the statute to recover the fees of referee and witnesses and other necessary disbursements, as provided for in those portions of the Revised Statutes unrepealed after the act of 1880 took effect, was preserved by subdivision 8 of § 3 of chapter 245 of the Laws of 1880. *Niles v. Crocker*, 88 Hun, 312, 68 St. Rep. 579.

Where reference of a disputed claim is ordered after the amendment of 1893, of § 2718 of the Code, the costs are awarded as in an action. *Henning v. Miller*, 64 St. Rep. 667, 83 Hun, 403, citing *Adams v. Olin*, 78 Hun, 309, 60 St. Rep. 695. Sections 1835 and 1836 do not have reference to actions against executors or administrators for equitable relief. Where such action is referred the costs are within the referee's discretion and its exercise cannot be reviewed upon a motion at Special Term. *McBride v. Chamberlain*, 56 St. Rep. 431. An executor who has defeated a referred claim against his estate is entitled not to costs as matter of law, but only to his disbursements. *Walker v. Gardener*, 60 St. Rep. 599, 8 Misc. 468, citing and reviewing the authorities upon the subject. It must be noticed that § 2718, as amended 1893, chapter 686, provides, among other things, that in determining the question of costs on a reference had in a Surrogate's Court, the referee shall be governed by §§ 1835 and 1836, thus establishing a new rule with reference to costs on such reference. This distinction must be borne in mind in connection with *Denise v. Denise*, 110 N. Y. 562.

Previous to the amendment of 1893, referred to, a reference under the statute was a special proceeding, and it was held in *Hallock v. Bacon*, 64 Hun, 90, s. c. 21 Civ. Pro. R. 255, that where costs were allowed other than referee's fees and disbursements, they must be recovered under the provisions of these sections. In *Supplee v. Sayre*, 51 Hun, 30, before amendment to § 1822, it was held that as a prerequisite to costs, the creditor must present his claim within the time limited by the statute, citing *Bradley v. Burwell*, 3 Den. 761; *Horton v. Brown*, 29 Hun, 654; *Clarkson v. Root*, 18 Abb. N. C. 462; *Bullock v. Bogardus*, 1 Den. 276. *Hendricks v. Isaacs*, 52 Hun, 100, seems

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to be superseded upon the question of costs by the latter amendments of the Code, although the question is not passed upon in 117 N. Y. 411, where the decision is reversed. In *Hopkins v. Lott*, 111 N. Y. 577, decided in 1888, it was held that upon a reference under the statute whereby plaintiff recovered nominal damages, that the defendant was not legally entitled to costs, nor was the allowance to him discretionary.

The award of costs to the defendant in a reference of a claim under the statute was held not to be affected by these sections, but to be governed by § 3229 in *Agar v. Tibbets*, 56 Hun, 272, S. C. 18 Civ. Pro. R. 338. The right of the plaintiff in an action against an executor, to costs, should be determined by the facts which appear upon the trial, and allegations in the complaint, as to the presentation of the claim, and its rejection and refusal to refer are proper evidence tending to show whether the plaintiff is within §§ 1835 and 1836, should be received on the trial, not to aid the jury in finding a verdict, but to enable the court to decide whether costs should be awarded against the defendant. *Schenck v. Rickaby*, 20 Civ. Pro. 384. Where a claim upon a note alleged to have been made by a decedent was presented to his executors and rejected, upon refusal by them to refer plaintiff was held entitled to costs on succeeding in the action, and it was decided that it was not necessary to determine whether the claim had been unreasonably resisted. *Clark v. Corwin*, 21 Civ. Pro. R. 108.

(Query, as to the effect of the amendment of 1895 to the Code upon this point.)

Costs cannot be awarded against an executor unless two things occur — first, the demand must have been presented within the time limited by the published notices to creditors to present claims; second, payment must have been unreasonably resisted and the defendant must have refused to refer. *King v. Todd*, 21 Civ. Pro. R. 114. Query, as to whether the requirement that the defendant must have refused to refer the claim is not superfluous under the present language of the section.

It cannot be said that a claim is unreasonably resisted so as to render a representative liable for costs, where he has succeeded on two trials. *Laughlin v. Strong*, 66 Hun, 273, 40 St. Rep. 317, 21 Supp. 550. Where a claim for unliquidated damages is reduced from three thousand to three hundred, it cannot be said that a refusal to pay the original amount was an unreasonable resist-

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ance, warranting the allowance of costs. *Rauth v. Davenport*, 18 Supp. 721, 45 St. Rep. 926, 22 Civ. Pro R. 121. Or where the claim is reduced from \$2,500 to \$900. *Wells v. Disbrow*, 48 St. Rep. 746. Or where it was reduced from \$306 to \$93. *Healy v. Murphy*, 21 Civ. Pro. R. 13, 16 Supp. 541. A reduction of \$17 on a claim of \$196, against an estate referred under the statute, is not such a reduction as to justify a denial of the liability on the part of the estate, and costs are properly allowed to claimant. *Dukelow v. Scarles*, 48 St. Rep. 91. But where an action is brought upon a disputed claim, though the amount recovered is but one-tenth of the amount claimed, plaintiff is entitled to costs if it appears that the executor refused to refer the claim. *Nellis v. Duesler*, 44 St. Rep. 228; *Roberts v. Pike*, 13 Supp. 559, 19 Civ. Pro. R. 422.

When § 2718 went into effect a special proceeding to determine a disputed claim by a reference ceased to be such and became an action to be treated as such in respect to all subsequent proceedings, and defendant in such action, if successful in resisting the claim made, is entitled to costs as a matter of right. The only discretion vested in the referee in regard to costs is in respect to those to be allowed to the plaintiff against an executor who has not unreasonably resisted a claim against the estate which he represents. It was the intention of the legislature in reference to these proceedings to make them exactly parallel to those which take place in an action after a reference has been ordered. *Adams v. Olin*, 78 Hun, 309, 29 Supp. 131. The court may, in its discretion, award costs as in an action against the plaintiff, on a reference of a claim against the estate of a deceased person, whenever the complaint is dismissed for any cause. Sections 1835 and 1836 relate only to costs against defendants in such proceedings, and will not affect the rule of costs against the plaintiffs. *Babbage v. Webster*, 54 St. Rep. 863; *Agar-v. Tibbetts*, 30 St. Rep. 456. The question whether or not costs should be awarded against an executor must be determined from evidence received at the trial, and the facts on which the executor's liability depends are properly pleaded in a complaint, and should not be stricken out on motion. *Schenck v. Rickaby*, 14 Supp. 444, 26 Abb. N. C. 364.

Costs will not be awarded against an executor, unless plaintiff's demand was presented within the time limited by a notice to creditors in writing. *King v. Todd*, 15 Supp. 156, 27 Abb. N.

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C. 149. A claimant against an estate is not entitled as a matter of right to either the costs or disbursements on a reference under the statutes. *Bailey v. Schmidt*, 19 St. Rep. 50, following *Miller v. Miller*, 32 Hun, 481. Where defendant, in an action brought by an executor as such, recovers judgment on a set-off, he is entitled to costs. Sections 1835 and 1836 regulate only the rule of costs in actions brought against executors. *Cohu v. Husson*, 5 Supp. 7.

In an action against an executor a referee has no power to award costs; there must be a special application to the court showing the facts giving the right to costs. *Morgan v. Skidmore*, 3 Abb. N. C. 92; *Smith v. Randall*, 67 Barb. 377; *Mesereau v. Ryerss*, 12 How. 300. And costs cannot be included in a judgment without an order of the court. *Knapp v. Curtiss*, 6 Hill, 386; *Howe v. Lloyd*, 2 Lans. 335; *Fish v. Cranc*, 9 Abb. 252. The certificate of the referee, before whom the trial took place, that defendant, before the commencement of the action, refused to refer the claim under the statute is *prima facie* conclusive upon the court, and is a fact proper to be certified where a case is charged to have been unreasonably defended; additional facts to those shown in the certificate may appear by affidavit, but, where the sole fact certified is the refusal to refer, the certificate ought to be conclusive. As to whether costs should be charged against defendant personally may be shown by affidavit. *Ely v. Taylor*, 11 St. Rep. 880. An order for costs is not necessary in an action against executors on a debt incurred by them. *Smith v. Patten*, 9 Abb. (N. S.) 205. If costs are included without leave of the court, they will be stricken out on motion. *Snyder v. Young*, 4 How. 217. But a judgment will not be set aside, when it appears the right to costs was clearly established, because it was entered without an order. *Hees v. Nellis*, 65 Barb. 440. Taxing costs against an executor without an order is an error not waived by appeal. *Howe v. Lloyd*, 2 Lans. 335. A referee cannot allow costs against an executor to be levied on his property, or on that of deceased. *Bailey v. Bergen*, 2 Hun, 520, affirmed, 67 N. Y. 346. An order denying a motion for costs against a trustee is appealable. *Slocum v. Barry*, 38 N. Y. 46; *Columbian Ins. Co. v. Stevens*, 37 N. Y. 536. But on a question of fact — *Niblo v. Binns*, 31 How. 476 — costs cannot be allowed without a certificate. *Wray v. Halliday*, 3 Law Bull. 98.

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An award of costs against an executor without a certificate of the trial judge, showing the facts upon which such an award must be based, is error. The evidence on the trial and its result may be taken into account, but cannot serve without the prescribed certificate. *Matson v. Abbey*, 141 N. Y. 179, modifying 70 Hun, 475. Where a claim is made for costs in an action against an executor for refusal to refer a claim, the certificate of the referee, that defendant has so refused to refer, is a fact proper to be proved and *prima facie* conclusive. *Ely v. Taylor*, 42 Hun, 205, 5 St. Rep. 127. Where an executor rejected a claim, an action was brought in which plaintiff recovered and entered judgment for the claim and costs, it was held that after an unqualified refusal plaintiff was entitled to her costs without the certificate of a judge. *Effray v. Masson*, 42 St. Rep. 657, 22 Civ. Pro. R. 59, citing *Carter v. Beckwith*, 104 N. Y. 236, 5 St. Rep. 617. An executor who has defeated a claim referred under the statute is not entitled to costs as matter of law, but only to his disbursements. The certificate required by § 1836 is necessary. *Walker v. Gardener*, 8 Misc. 468. Where no certificate of unreasonable resistance or neglect is given by the referee, no costs can be recovered against the executor. *Whitcomb v. Whitcomb*, 92 Hun, 443, 36 N. Y. Supp. 607, 71 St. Rep. 661.

An executor who is successful in resisting a claim against the estate is entitled to costs. *Winne v. Hills*, 91 Hun, 89, 36 N. Y. Supp. 683. Where an objection to accounts of executors of a deceased guardian was justified, the estate of the infant should not be charged with the costs of the proceeding. *Matter of Frank*, 1 App. Div. 39, *sub nom. Matter of Schneider*, 36 N. Y. Supp. 972; *sub nom. Matter of Metzger v. Schneider*, 72 St. Rep. 75.

Certificate of Judge as to Costs, etc.

(Title.)

I, Alton B. Parker, judge of the Supreme Court, before whom the trial of said action took place, do hereby certify that this action was brought against George Hanley, the defendant, in his representative capacity as executor of the will of Chauncey Hanley, deceased, to recover a sum of money only; and that it appeared on such trial that the plaintiff's demand in said action was presented to said defendant before the expiration of the time limited by the notice published as prescribed by law, requiring creditors to present their claims, and that the payment thereof was unreasonably resisted by the said George Hanley, and that costs in said action were awarded

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against said defendant, to be collected out of his individual property, by reason of the following facts: (Here insert facts.)

Dated, July 8, 1896.

A. B. PARKER,
Justice Supreme Court.

§ 3246. In an action, brought by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or to be sued, costs must be awarded, as in an action by or against a person, prosecuting or defending in his own right, except as otherwise prescribed in sections 1835 and 1836 of this act; but they are exclusively chargeable upon, and collectible from the estate, fund, or person represented, unless the court directs them to be paid, by the party personally, for mismanagement or bad faith in the prosecution or defence of the action.

An executor is only personally liable for costs when found, on due proof, guilty of mismanagement or bad faith, and an order of the court must be obtained so charging him. *Alger v. Conger*, 17 Hun, 45; *Lindsay v. Deafendorf*, 43 How. 90; *Marsh v. Hussey*, 4 Bosw. 614; *Woodruff v. Cook*, 14 How. 481; *Dodge v. Crandal*, 30 N. Y. 294; *Slocum v. Barry*, 38 N. Y. 46. Costs awarded to the plaintiff in an action against an executor are presumed to be payable out of the estate, not by the defendant personally; *Berwick v. Halsey*, 4 Redf. 18; and an order is necessary to charge him personally. *Lindsay v. Deafendorf*, 43 How. 90; *Fish v. Crane*, 9 Abb. (N. S.) 252. Executors and administrators in those cases in which they bring actions in their representative character, which they might have brought in their own name, and fail, are liable for costs; it is only when they necessarily bring actions in their representative capacity that they escape liability for costs on failing in the action, and even then they may be charged personally with costs in case of mismanagement or bad faith. *Holdrige v. Scott*, 1 Lans. 303; *Bostwick v. Brown*, 15 Hun, 308; *Feig v. Wray*, 64 How. 391; *Fox v. Fox*, 5 Hun, 53. In all causes of action, where the same arises against the executor after the death of the testator, the claim is against the executor, and costs must be *de bonis propriis*. *Ferrin v. Myrick*, 41 N. Y. 322. Where an action was brought by trustees to enforce payment of a debt due the *cestui que trust*, held, that, as they acted in their representative capacity, costs awarded in the complaint could not be enforced against them personally without an order of the court. *Slocum v. Barry*, 38 N. Y. 46. Costs are not allowed against executors or administrators personally, except for wantonly bring suit or liability arising by their own act. *Theriot v. Prince*, 12 How. 451; *Ackerman v. Emott*, 4 Barb. 626. An executor or

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administrator is personally liable for costs in an action not necessarily prosecuted in a representative capacity. *Woodruff v. Cook*, 14 How. 481; *Bedell v. Barnes*, 29 Hun, 589; *Brockett v. Bush*, 18 Abb. 337.

One who, as administrator, commences a suit does not become personally liable for costs by the fact of his ceasing to be administrator pending the action. *Baxter v. Davis*, 3 Abb. (N. S.) 249.

When two persons sue as executors, one of them cannot be charged with costs on the ground that he was beneficially interested in the recovery in the right of his wife. *Finly v. Jones*, 6 Barb. 229. Where an executor brings an action in his representative capacity for a claim alleged to be due the estate, although he is beneficially interested in the recovery, the cause of action not being divisible, and his duty requiring him to pursue it in the only way in which it was sustainable, if unsuccessful, the costs are chargeable exclusively on the estate, and he can only be charged with them personally, by order of the court, for mismanagement or bad faith. *Hone v. De Peyster*, 106 N. Y. 645, 11 St. Rep. 309, reversing 44 Hun, 487, 9 St. Rep. 224. Where a trustee has received funds and disbursed them so that he has no funds in hand to pay costs, the court may allow a judgment to be entered against him personally, as it was his duty to hold sufficient funds. *Butler v. B. & A. R. R. Co.* 24 Hun, 99. A claim was made on administrators by persons claiming as trustees; the papers in the case did not style them trustees. *Held*, they were not personally liable for costs. *Alger v. Conger*, 17 Hun, 45, affirmed, 79 N. Y. 633. Taxing costs against executors without an order is not waived by appeal. *Howe v. Lloyd*, 2 Lans. 335. An order denying a motion to set aside an execution for costs against plaintiffs, personally, is appealable to General Term and to the Court of Appeals. *Slocum v. Barry*, 34 How. 320. Costs in equity suits, even against executors, are in the discretion of the court. *Van Riper v. Poppenhausen*, 43 N. Y. 68.

Where an executor has brought an action not in good faith, he is properly charged individually with costs. *Garlock v. Vandewort*, 128 N. Y. 374.

And so where the cause of action, if any, arose after testator's death and the action could have been maintained by plaintiff in his individual name. *Ackley v. Ackley*, 50 St. Rep. 554, 21 Supp. 877; *Buckland v. Gallup*, 105 N. Y. 453, affirming 40 Hun, 61.

CHAPTER XXIII.

ACTION BY A CREDITOR AGAINST HIS DEBTOR'S NEXT OF KIN, LEGATEE, HEIR OR DEVISEE.

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ARTICLE I.

ACTION AGAINST NEXT OF KIN, LEGATEES, ETC. §§ 1837- 1842.

§ 1837. When action lies against next of kin, legatees, etc.

An action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the

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next of kin or legatees of a testator to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which the action might have been maintained, against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for that purpose, does not impair his right to maintain such an action.

§ 1838. Action may be joint or several.

An action, specified in the last section, must be brought, either jointly against the surviving husband or wife, and all the legatees or all the next of kin, as the case may be, or at the plaintiff's election, against one of them only. But where a legacy is received by two or more persons jointly, they are deemed one legatee, within the meaning of each provision of this article, relating to legatees.

§ 1839. In joint action, recovery to be apportioned.

Where a joint action is brought, as prescribed in the last section, the whole sum, which the plaintiff is entitled to recover, must be apportioned among the defendants, in proportion to the legacy or distributive share, as the case may be, received by each of them; and the final judgment must award, against each defendant separately, the proportionate sum thus ascertained. The costs of the action, if the plaintiff is entitled to costs, must be apportioned in like manner; except that the expenses of serving the summons upon each defendant must be taxed against him only; and one sheriff's fee, for returning an execution, may be taxed against each defendant, against whom any sum is awarded.

§ 1840. Recovery in a several action.

Where an action is brought against the surviving husband or wife only, or against one only of the next of kin, or legatees, the sum, which the plaintiff is entitled to recover, cannot exceed the sum which he would have been entitled to recover from the same defendant, in an action brought, as prescribed in the last section.

§ 1841. Requisites to recovery in action against legatee.

If the action is brought against a legatee, or against all the legatees, the plaintiff must show, either

1. That no assets were delivered by the executor or administrator of the decedent, to the surviving husband or wife, or next of kin; or
2. That the value of assets, so delivered, has been recovered by some other creditor; or
3. That those assets, after payment of the expenses of administration and preferred demands, are not sufficient to satisfy the demand of the plaintiff; in which case, he can recover only for the deficiency.

§ 1842. *Id.*; in action against a preferred legatee.

Where some of the legatees are preferred to others, an action may be maintained, as prescribed in the last five sections, against one or all of those who are equally preferred, or equally deferred, as if the legatees of that class were all the legatees. But where it is brought against a preferred legatee, or a class of preferred legatees, the plaintiff must show, in addition to the matters, with respect to the next of kin, required by the provisions of the last section, the same matters, with respect to each legatee, or class of legatees, to whom the defendant or defendants are preferred.

ART. I. Action against Next of Kin, Legatees, etc.

No action can be brought against next of kin, save where the creditor has neglected to present his claim to the personal representatives of the deceased. Where the creditor has presented his claim, and the same has been rejected, and six months have elapsed without bringing the action as required by the statute, this is a defence not only to an action by the personal representatives of the deceased, but, also, to any action brought to enforce the claim against heirs-at-law or next of kin. The fact that the claim is of such a nature that it could not be enforced during the lifetime of deceased does not take it out of the operation of the statute. *Selover v. Coc*, 63 N. Y. 438.

It is said by the codifiers that "it must be borne in mind, in determining what remedy the creditor ought to have, that this action always bears harshly upon the defendants, and it can never be necessary, except as the result of the creditor's own omission to pursue a more appropriate remedy. It is, therefore, more equitable that he should be required to collect from each defendant a proportion, and that if any of the defendants are insolvent the loss should fall upon him, than that he should be permitted to collect his entire demand from one of the next of kin or legatees, or turn the person thus selected to bear alone the common burden over to an action for contribution."

The term "next of kin," as used in the section of the Revised Statutes for which this is substituted, means those to whom, under the act of distribution, the estate would pass; such a remedy is properly brought against infants, when the amount of the estate belonging to them has been paid over to the general guardian, and the judgment should direct the money to be paid out of the funds in such guardian's hands. *Merchants' Ins. Co. v. Hinman*, 13 Abb. 110. That husband is not next of kin of the wife, under the statute to recover pecuniary damages for her death, see *Drake v. Gilmore*, 52 N. Y. 389.

The effect of a sale under § 1837 is discussed in the opinion, Finch, J., in *Cunningham v. Parker*, 146 N. Y. 29, 65 St. Rep. 774.

The fact that there has been no judicial settlement in the Surrogate's Court of the accounts of an administratrix furnishes no objection to the determination on the merits of an action brought against the next of kin of the decedent under this section. *Miller v. Morton*, 89 Hun. 574. Before the adoption of § 1837 the heirs

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took, subject to the payments of the debts of their ancestors, to the extent of any deficiency of his personalty applicable to that purpose. *Reed v. Patterson*, 134 N. Y. 128, 45 St. Rep. 793, affirming 55 Hun, 608, 29 St. Rep. 102. The right to follow legatees for the debt of the testator existed independently of statute. *Colgan v. Dunne*, 50 Hun, 443, 21 St. Rep. 315. A creditor who holds judgment need not prove his inability to collect the debt by proceedings at law, but it is sufficient to show that the personal assets of deceased were not sufficient to discharge the debt. *Blossom v. Hatfield*, 24 Hun, 275.

A creditor or legatee who has consented to the misappropriation of the personal assets of the administrator to his own use is thereby estopped from proceeding against him or his sureties or any of the next of kin. The personal assets are the primary fund to pay the debts, and if they are wasted or misappropriated by the administrator, the land cannot be reached until the personal responsibility of the administrator and his sureties is exhausted. *Moyer v. Moyer*, 17 Misc. 648. The executrix and legatee of the guarantor of a mortgage in an action of foreclosure had a decree against her requiring her as legatee, in case any deficiency should exist after applying the proceeds of the mortgage to the payment of the debt, to pay the same to the extent of the legacy. *Collier v. Miller*, 16 Supp. 633.

The provisions of the statute governing such an action as this must be complied with, and it is not sufficient to show that the person against whom such action is brought has in his possession property coming from the estate of the deceased. *Brater v. Hopper*, 77 Hun, 244, 28 Supp. 472. Where an action was brought to foreclose a mortgage and a deficiency judgment obtained, an action will lie under the statute and the liability created by these succeeding sections, although the mortgage was executed more than either six or ten years before the time such action was brought, that the action must be regarded as brought upon a sealed instrument and the period of limitation was twenty years. *Colgan v. Dunne*, 50 Hun, 443.

One who receives property of a testator remains liable for the debts to the extent of the property which he receives, and nothing can accomplish a discharge of the lien or trust in favor of the creditor, except payment or the statute of limitations. If a devisee sells it to a *bona fide* purchaser after three years, the con-

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sideration received is merely substituted in place of the land, and upon familiar principles of equity jurisprudence may be followed and in such a case as this may be taken to pay his obligation. *Matter of Callaghan*, 69 Hun, 161, 52 St. Rep. 537. Where real estate, devised or descended, is sought to be charged with the debts of the deceased, the validity and existence of the debts are open to contest by the heirs or devisees in a proceeding, and a decree of the surrogate on the accounting does not conclude them, and, except in the case of a judgment on the merits, is not even *prima facie* evidence of the existence of the debt. *Long v. Long*, 142 N. Y. 545. Under the Revised Statutes, the liability of an heir for the debt of his ancestor is to be enforced by suit in equity. Provisions of the Revised Statutes are applicable rather than the modified provisions in the Code, where the decedent died before the enactment of the Code, although it was not until after the enactment of the Code that the creditor collected the judgment upon which he proceeded. In a suit by a creditor of a decedent to recover against the heirs to the value of the estate to which they succeeded, and to reach proceeds of a sale thereof which have been made for their benefit, *held*, that as the fund was real property, the administratrix being merely a foreign administratrix, was properly joined individually by reason of her having obtained an order of the court for the payment of the support of the infants out of the fund, but that she was not a proper party in her capacity as administratrix. *Hents v. Phillips*, 23 Abb. N. C. 15.

Creditors of a decedent, whose claims against the proceeds of his real estate in litigation are protected by a deposit of a part thereof in court, under stipulation that the fund is to be held to answer for any deficiency in his assets, to pay the debts for which his real estate may be liable, may maintain an action against the adverse claimants, joining the depository as stakeholder, and joining the heirs of the deceased for the purpose of obtaining judgment for payment out of the fund and of recovering any deficiency from the heirs, to the extent of their liability as such for the decedent's debt. *U. S. Life Insurance Co. v. Jordan*, 21 Abb. N. C. 330. An action by an attorney for services rendered to a decedent in his lifetime is properly brought against his surviving heir-at-law and next of kin under §§ 1837 and 1860, and it is competent for the plaintiff to give evidence of the number of days spent upon the case in which he was retained by the de-

 Art. 2. When Action Lies against Heirs and Devisees.

cedent. *Sheil v. Muir*, 22 St. Rep. 829. Where testator bequeathed part of his estate to a daughter and part in trust for other beneficiaries, an action cannot be maintained against the trustee without making the personal representatives parties under this section of the Code, which provides that a recovery for the debt of decedent must be apportioned among those who receive his estate. *Brater v. Hopper*, 28 Supp. 472, 77 Hun, 244. During three years after the granting of letters testamentary or of administration, creditors have their remedy against the personal property of the decedent and against the executors or administrators for any waste or misappropriation of the same. During that period they may resort to the real estate, and by showing a compliance with the provisions of the law they may compel its sale for the payment of debts, but if they fail to get payment within three years out of the real or personal estate, after that time further remedies are given them by §§ 1837 to 1860. They may sue the surviving husband or wife or next of kin of the decedent who have received any of his personal property; failing to recover from them, they may sue any legatee who has received any of the property or assets of the decedent; failing to recover from them, then they may sue and recover from the heirs who have received any of the real estate or its proceeds; failing here, they may resort to the devisees who have received any of the real estate or its proceeds. *Matter of Kingsland v. Murray*, 133 N. Y. 170, 44 St. Rep. 515.

No precedent is given for complaint on account of the very great length of the pleading arising from the minute details necessary from the character of the action.

ARTICLE II.

WHEN ACTION LIES AGAINST HEIRS AND DEVISEES.

§§ 1843-1849.

§ 1843. Liability of heirs and devisees.

The heirs of an intestate, and the heirs and devisees of a testator, are respectively liable for the debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by the decedent.

§ 1844. When action therefor may be brought.

But an action to enforce the liability declared in the last section, cannot be maintained, except in one of the following cases:

Art. 2. When Action Lies against Heirs and Devisees.

1. Where three years have elapsed since the death of the decedent, and no letters testamentary, or letters of administration, upon his estate, have been granted within the state.

2. Where three years have elapsed since letters testamentary, or letters of administration, upon his estate, were granted within the state.

§ 1845. Effect of application to sell real property.

Where it appears that, at the time of the commencement of such an action, a petition, seasonably presented, as prescribed by law, praying for a decree to dispose of real property of the decedent, for the payment of his debts, was pending in a surrogate's court, having jurisdiction, the proceedings in the action, subsequent to the complaint, must be stayed by the court, until the petition is disposed of, unless the plaintiff elects to discontinue. If a decree to dispose of real property, pursuant to the prayer of the petition, is granted, the action must be dismissed, unless the plaintiff has alleged in his complaint, or alleges in a supplemental complaint, that real property, other than that included in the decree, descended or was devised to the defendants. If the plaintiff elects to proceed under such an allegation, he is entitled to a preference in payment, out of the real property, with respect to which the allegation is made; but he cannot share, as a creditor, in the distribution of the money, arising from the disposal of the real property, described in the decree; and the judgment in the action does not charge, or in any way affect, that property.

§ 1846. Action must be joint.

An action against heirs or devisees, brought as prescribed in the last three sections, must be brought jointly against all the heirs, to whom any real property descended from the decedent, or jointly against all the devisees, as the case may be.

§ 1847. Recovery to be apportioned.

In such an action, the sum, which the plaintiff is entitled to recover, for damages and costs, must be apportioned among all the defendants, in proportion to the value of the real property descended to each heir, or devised to each devisee, as the case may be, as prescribed in section 1830 of this act, for a similar apportionment among legatees or next of kin, in proportion to the assets received by them. The final judgment must, in like manner, award against each defendant the proportionate sum, with which he is chargeable.

§ 1848. Requisites to recovery against heirs.

Where the action is brought against heirs, the plaintiff must show, either

1. That the decedent's assets, if any, within the state were not sufficient to pay the plaintiff's debt, in addition to the expenses of administration, and debts of a prior class; or

2. That the plaintiff has been unable, or will be unable, with due diligence, to collect his debt, by proceedings in the proper surrogate's court, and by action against the executor or administrator, and against the surviving husband or wife, legatees, and next of kin.

The executor's or administrator's account, as rendered to, and settled by, the surrogate, may be used as presumptive evidence of any of the facts, required to be shown by this section.

Art. 2. When Action Lies against Heirs and Devisees.

The codifiers say as to this section in a note to their report:

Section 33 as amended by Laws 1859, chap. 110, and section 36, consolidated and amended so as to remove the following obscurities and imperfections. By the construction put upon section 33 of the Revised Statutes, the personal representatives and the heirs or devisees cannot be joined in one action; *Meserveau v. Kierss*, 3 N. Y. 261; *Gore v. Clark*, 6 Hill, 350; even if the same person takes both real and personal property. *Schemerhorn v. Barhydt*, 9 Paige, 28. This restriction is based not on any principle or policy, but purely on the language of the statute. It is evident that in many cases the rule bears very hardly upon the creditor; for the language of the second clause of section 33 of the Revised Statutes apparently requires him to prosecute to judgment and execution the executor and every one of the legatees or next of kin, although the personal estate may be insolvent. Again it sometimes happens that there is a doubt as to the capacity in which a beneficiary takes; and a mistake in that respect would, it is supposed, be fatal to the creditor. See *Wood v. Wood*, 26 Barb. 356. To meet this difficulty effectually, it would be necessary to insert a new section giving the court the power to dispose of the entire question in one action. But there are some grave objections to a general provision of that description, and accordingly the original has been amended in this section by adding the final clause of subdivision 1, "in addition," etc., by inserting the words "or will be unable with due diligence" in subdivision 2, and by adding the entire concluding sentence of the section. See *Malloy v. Vanderbilt*, 4 Abb. N. C. 127. The amendment in subd. 1, in connection with the concluding sentence, will enable the creditor to maintain his action whenever the executor's account shows that the assets have been improperly absorbed for other purposes; while the extension of the second subdivision to a case where the plaintiff can show that he would have been unable to collect his debt by proceedings against the representatives of the personalty, will relieve him from the necessity of suing them where no benefit will accrue therefrom. See *Schover v. Coe*, 63 N. Y. 438.

§ 1849. *Id.*; against devisees.

Where the action is brought against devisees, the plaintiff must show, in addition to the matters specified in the last section, either that the real property of the decedent, which descended to his heirs, was not sufficient to pay the plaintiff's debt, or that the plaintiff has been unable, or will be unable, with due diligence, to collect his debt by an action against the heirs.

Where an action was brought to recover a debt during the life-time of the debtor, and after his death revived against his executors, and subsequently plaintiff applied to have the devisees made parties, *held*, that the application was properly denied, as, if granted, it would, in effect, authorize the joinder of two distinct and divisible causes of action. *Greene v. Marline*, 27 Hun, 246. But the rule that an action cannot be maintained against the heir and executor does not apply where the creditor has established his demand before the surrogate and the personal estate of the deceased was concealed or wasted. *Littell v. Sayre*, 7 Hun, 485.

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A judgment obtained against the executor, though upon the merits, is no evidence against the heir; there is no privity between such parties. *Ferguson v. Broome*, 1 Bradf. 10. The action of the administrators in allowing certain claims against the estate is not conclusive upon the heirs as to the real estate descended. *Barnes v. Hathaway*, 66 Barb. 452. Where an insurance is effected by the heirs after the death of their ancestor, it is, it seems, for their benefit solely, notwithstanding the defeasible nature of their estate in consequence of its liability to sale for payment of the ancestor's debts. *Herkimer v. Rice*, 27 N. Y. 163. This provision of the Code under which the liability of devisees arises does not require that the legal title to the property shall have passed; they are liable where there is an effectual devise of the entire beneficial estate in the land and it is accepted. *Armstrong v. McKelvey*, 104 N. Y. 179. Heirs do not stand simply in the position of the holder of an equity of redemption who is not responsible for the mortgage debt: the heir who sells may in some cases become personally liable, and it may be said that he is under some obligation to the creditor; when, therefore, in performance of such obligation, the heirs have provided for the payment of these debts, it is equitable that the creditors should have the benefit of the assignment. *Pulver v. Skinner*, 42 Hun, 322. A devisee is liable for the testator's debts to the extent of the property received by him, but beyond this he does not become personally liable by merely accepting of the devise, or the rents and profits thereof, though the devise is charged with the debts, unless the will charges the devisee with the duty of personally paying the debts, or unless the devise is upon the condition that the devisee pay the debts. *Clift v. Moses*, 7 St. Rep. 692, citing *Cronkhite v. Cronkhite*, 1 T. & C. 266; *Wheeler v. Lester*, 1 Bradf. 213, 293. See, also, *Whitaker v. Young*, 2 Cow. 569; *Schemhorn v. Barhydt*, 9 Paige, 28.

The statute provides that no action shall be brought upon it within three years after the decease of the testator; such three years do not constitute part of the period of limitation, therefore a party has nine years from the maturity of his claim in which to bring an action. *Mead v. Jenkins*, 27 Hun, 570, citing *Wood v. Wood*, 26 Barb. 356; *Sharpe v. Freeman*, 45 N. Y. 802. In *Wood v. Wood*, 26 Barb. 356, it was held that the ten years' statute was applicable. See *White v. Kane*, 51 Super. Ct. 295; *Hamilton*

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v. *Smith*, 12 St. Rep. 713. And no suits can be brought against the devisees or heirs-at-law within three years of the time of granting letters testamentary or of administration. *Selover v. Coe*, 63 N. Y. 438; *Roe v. Swezey*, 10 Barb. 247; *Butts v. Genung*, 5 Paige, 254. This objection is not waived by not being pleaded; the plaintiff must show affirmatively that he is within the provisions of the statute; the objection need not be taken by demurrer or answer. The debts of a decedent are not a charge upon the heir until made so by legal proceedings. *Wilson v. Wilson*, 13 Barb. 252. The action given by statute is against the property, and the devisee cannot be charged personally where the real estate has not been aliened. *Wood v. Wood*, 26 Barb. 356. The heir takes title absolutely, subject to be charged with debts by the executor or creditor. *Hyde v. Tanner*, 1 Barb. 76; *Wilson v. Wilson*, 13 Barb. 252; *Waring v. Waring*, 3 Abb. 246. Lands aliened in good faith, before the commencement of the suit, by an heir or devisee, are not liable in the hands of the purchasers for the payment of such debt. *Wambaugh v. Gates*, 11 Paige, 505. See § 1853. See, also, *Wood v. Wood*, 26 Barb. 356.

Upon the application of a creditor of a decedent for an order directing land devised to be sold to pay the debts of such decedent, judgment-creditors of such decedent may set up the statute of limitations as a defence. The fact that a judgment was recovered against an executor, who was also a devisee, does not avoid the statute. *Raynor v. Gordon*, 23 How. 264.

Heirs may be jointly sued for a debt of their ancestor, but the statute does not make them liable as joint debtors. *Kellogg v. Olmsted*, 6 How. 487. All the heirs must be joined as defendants. *Mesereau v. Ryerss*, 3 N. Y. 261; *Butts v. Genung*, 5 Paige, 254; *Schemehorn v. Barhydt*, 9 Paige, 28; *Stuart v. Kissam*, 11 Barb. 271; *Cassidy v. Cassidy*, 1 Barb. Ch. 467. But if one of the heirs or devisees has died without leaving any property, his personal representatives need not be made a party. *Wambaugh v. Gates*, 11 Paige, 506. The plaintiff cannot make other creditors or persons having liens upon the real estate parties; the statute contemplates an action by each creditor for himself. *Parsons v. Bowne*, 7 Paige, 354.

A suit at law against the next of kin or legatees is preliminary to a right to proceed against the heirs if assets were left by deceased. *Roe v. Swezey*, 10 Barb. 247; *Stewart v. Kissam*, 11

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Barb. 271. In order to maintain the action, it must be shown that the deceased left no personal property within this State, or that the same was insufficient to pay the debt, or that the debt could not be collected from the personal representatives of the grantor, or from his next of kin or legatees. *Armstrong v. Wing*, 10 Hun, 520. In an action by a judgment-creditor of a deceased person to secure payment of the judgment from real estate which descended to the heirs-at-law, it is sufficient to allege and prove that the personal assets of the deceased were not sufficient to pay and discharge the debt, and it is not necessary to show the inability of the creditor to collect the same, by proceedings at law or before the surrogate, from the personal representatives, next of kin, or legatees of the deceased. *Blossom v. Hatfield*, 24 Hun, 275, following *Sclover v. Coe*, 63 N. Y. 438, distinguishing 10 Hun, 520, *supra*, and citing *Roe v. Sweeney*, 10 Barb. 247; *Gere v. Clark*, 6 Hill, 350; *Butts v. Genung*, 5 Paige, 254; *Wilber v. Collier*, 3 Barb. Ch. 427; *Wambaugh v. Gates*, 11 Paige, 505, and *Mesereau v. Ryerss*, 3 N. Y. 261. The latter case holds that the heirs and personal representatives cannot be joined in an action of this character. It is held in *Sclover v. Coe*, 63 N. Y. 438, that the heirs or next of kin of a deceased person can only be made liable for his contracts, or upon his debts, in manner prescribed by statute, and it must appear that the deceased left no personal estate in the State out of which the debt could be collected, or that the personal assets have been applied toward the payment of the obligation. The complaint should allege the special facts on which defendant's liability depends. *Butts v. Genung*, 5 Paige, 254; *Gere v. Clark*, 6 Hill, 350.

Section 1843 and the following sections were not designed to affect the interests of remaindermen nor to continue in such case the doctrine of collateral warranty. *Trolad v. Rogers*, 68 St. Rep. 774, 88 Hun, 422.

In an action brought by creditors under § 1844, to reach and apply certain real estate to the payment of their debts, it was held that the failure to pay legacies provided for by the will of decedent did not work a forfeiture of the devise, nor did the direction to the executor to pay the debts operate to charge the debts upon the lands devised to him. *Cunningham v. Parker*, 146 N. Y. 29.

In *Adams v. Fassett*, 56 St. Rep. 31, the opinion states that the history of legislation leading up to the enactment of § 1843 is

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given in *Reed v. Patterson*, 134 N. Y. 128, 45 St. Rep. 793, and that at page 136 of the opinion in that case it is said that it is quite apparent that § 1848 of the Code enlarges the rights of creditors by permitting recoveries "when it appears that the creditors will be unable with due diligence to collect their debts by proceedings in the proper Surrogate's Court and by an action against the executor or administrator."

An action against devisees to enforce to the extent of their interest in the devised realty, payment of a note made by their testator, is to be deemed an action to recover upon the note, and hence is subject to the six years' statute of limitations as affected by the statutory provisions relating to the time of commencing actions on claims against decedents. A right of action against devisees under subdivision 1 of § 1844, which has accrued by the lapse of three years after the death of the decedent without the issue of letters testamentary, is not suspended by the subsequent issue of such letters, and in such case the second subdivision of that section respecting actions after a lapse of three years after the grant of letters, has no application. *Adams v. Fassett*, 149 N. Y. 61.

Nothing can accomplish the discharge of the lien upon the land of a creditor as against the legatee or heir-at-law, except payment or the statute of limitations. He remains liable personally for debts to the extent of the property which he receives. If he sells to a *bona fide* purchaser after three years, the consideration is merely substituted in place of the land, and may be followed and taken to pay the obligation. *Matter of Callaghan*, 52 St. Rep. 537. In an action brought against heirs to collect a debt due from their ancestor, the burden is upon the plaintiff to establish the extent of the value of the personal property at the time when it passed to the executor and the debts then due. Proof of sale of such property made years subsequently, and the amount realized thereon, is not sufficient to overcome the presumption of its value arising from the executor's account. *Reed v. Patterson*, 29 St. Rep. 102. Under the provisions of § 1846, an action of this kind must be brought jointly against all the devisees; there can be but one judgment in the action, and the provisions of § 1847, providing for the apportionment of damages and costs, does not render the action one against the devisees separately so as to enable a single defendant to interpose a counterclaim. An action brought

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under this section may be brought at any time within ten years after the cause of action accrues. It is an equitable action and not for the recovery of money or specific real property. *Mortimer v. Chambers*, 43 St. Rep. 365. A devisee of an undivided one-third of the residue of the testator's real property is liable only for one-third of the claims existing against his estate. *Fink v. Berg*, 50 Hun, 211, 19 St. Rep. 322.

As to what allegations are sufficient in a complaint in an action of this character, *Hentz v. Phillips*, 6 Supp. 16, 23 Abb. N. C. 15.

The statute contemplates that a devisee or heir should be liable according to the measure of the value of the property devised to him, and the heirs or devisees may allege in their answer and prove other debts of the decedent unsatisfied belonging to the same class as that in suit or a prior class, and properly chargeable against the land by reason of the deficiency of personalty. *Hauselt v. Patterson*, 124 N. Y. 349. Cited, *Murdock v. Waterman*, 145 N. Y. 65.

As to the effect of the repeal of the Revised Statutes by chapter 245, Laws 1880, see *Reed v. Patterson*, 134 N. Y. 128, 45 St. Rep. 793, affirming 29 St. Rep. 102, 55 Hun, 608.

It seems, in an action brought to charge devisees to the extent of the real property devised to them, that a debt of their testator upon a promissory note is one which falls within § 388, provided that an action can be commenced within ten years after the cause of action accrues. Such an action is in any event subject to extension by the three years statutory stay from the death of the testator imposed by § 1844. *Adams v. Fassett*, 73 Hun, 430. If the conveyance made by testator with fraudulent intent is void, it seems that, at least as to creditors, the land, at the death of the debtor, must be treated as going to his heir or legatee, and the creditor, treating the conveyance as void as to him, must reach the land as he would any other land which had belonged to the deceased at his death. *Harvey v. McDonnell*, 48 Hun, 409. It seems that under this section the liability of the heirs and devisees for the debts of the decedent to the extent of the real estate descending or devised to them only extends to the real estate and does not attach to that which may be made out of it by the skill, management or labor of the heir or devisee. Where land is devised charged with the payment of debts generally, an acceptance of the devise does not create a personal liability to

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pay, but instead thereof a lien is created in favor of creditors who can enforce it as against the land devised. *Clift v. Moses*, 116 N. Y. 144.

The liability of an heir for the debts of a person from whom he has inherited or taken land by devise is measured by the property which has descended to him; to that extent it is personal, and if the property has been alienated before the commencement of an action by a creditor of the deceased to acquire a statutory lien upon the same, such creditor may take a personal judgment against the heirs for its value. The remedy of the creditor, however, is founded solely upon the provisions of the statute and it is confined to an action against the heirs of an intestate, and against the devisees of a testator. It is not given as against the heir-at-law of a devisee, nor as against the devisee of an heir at law, and the only remedy afforded by the statute, when the property has been alienated before the commencement of the action, is a personal judgment against the heir for the value of the property so alienated, whether it be alienated in good or bad faith. *Seemle*, that after the obtaining of such judgment and an execution thereon returned unsatisfied, the creditor may file his ordinary creditor's bill to set aside a conveyance, made by such heir or devisee, alleged to be fraudulent; but whether such conveyance be fraudulent or not cannot be determined in the action brought to acquire the statutory lien. *Rogers v. Patterson*, 79 Hun, 482, 61 St. Rep. 278.

Heirs-at-law and devisees are properly joined in an action where it is alleged that the real estate which passed to the heirs-at-law is insufficient to satisfy the claim, and judgment may be so framed as to direct that the estate which descended to the heirs-at-law be first exhausted. *Rockwell v. Geery*, 4 Hun, 606, 6 T. & C. 687. In a proceeding to hold devisee liable for a debt taken against one properly charged with one-third of the debt, such devisee is liable for the full costs and disbursements of the action and no apportionment thereof shall be made. *Fink v. Berg*, 50 Hun, 211, 19 St. Rep. 322. The effect of this section is to enlarge the rights of creditors of a decedent by permitting recoveries against devisees for debts of their testator, when it appears that the plaintiff will be unable with due diligence to collect his debts. *Adams v. Fassett*, 73 Hun, 430. And by § 3352, the construction of § 1848 is restricted so that an action cannot be maintained to charge the lands

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of the testator in the hands of his heirs with debts, if he left personalty sufficient to pay his debts. *Reed v. Lozier*, 48 Hun, 50.

The last clause of § 1848 must be interpreted as providing either that an executor's account when so settled must be received as presumptive evidence against all defendants or that it is presumptive evidence against such of the defendants as were parties to the decree on the accounting. It does not make mere statements annexed to the account, but not before the Surrogate's Court for adjudication, presumptive evidence of facts stated. *Reed v. Patterson*, 134 N. Y. 128, 45 St. Rep. 793, affirming 55 Hun, 608, 29 St. Rep. 102. Same effect, *Estate of McCunn*, 15 St. Rep. 712.

See *Matter of Bingham*, 127 N. Y. 296, for an application of the rule as to what real estate should be charged for the apportioned amount of the debt of the testator.

Precedents are omitted for the reason given at foot of preceding article.

ARTICLE III.

REGULATIONS PECULIAR TO SUCH ACTIONS. §§ 1850-1860.

§ 1850. Deductions for prior recoveries.

Where the assets, applicable to the plaintiff's debt, were sufficient to pay a part thereof, or a part thereof has been collected from the executor or administrator, or from the surviving husband or wife, next of kin, or legatees, the plaintiff can recover only for the residue, remainder unpaid or uncollected; and if the action is against devisees, he can recover only for the residue, which the real estate descended, or the amount of his recovery against the heirs, is insufficient to discharge.

§ 1851. Complaint to describe land descended, etc.

The complaint must describe, with common certainty, the real property, descended or devised to the defendant; and must specify its value.

§ 1852. Judgment; when to be satisfied out of land.

If it appears that any of the real property, which descended or was devised to a defendant, had not been aliened by him at the time of the commencement of the action, the final judgment must direct that the debt of the plaintiff, or the proportion thereof which he is entitled to recover against that defendant, be collected out of that real property. Such a judgment is preferred, as a lien upon that property, to a judgment obtained against the defendant, for his individual debt or demand.

§ 1853. *Id.*; when not a lien on land aliened.

But a judgment, rendered as prescribed in the last section, does not bind, and the execution thereupon cannot in any way affect, the title of a purchaser, in

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good faith and for value, acquired before a notice of the pendency of the action is filed, or final judgment is entered, and the judgment-roll filed.

§ 1854. How judgment taken, when land aliened.

If it appears that, before the commencement of the action, or afterwards and before the filing of a notice of the pendency of the action, the defendant aliened the real property descended or devised to him, or any part thereof, the plaintiff may, at his election, take a final judgment against him for the value of the property so aliened, or so much thereof as may be necessary, as in an action for the defendant's own debt.

§ 1855. Classification of debts, to be enforced under this article.

Where the surviving husband or wife, next of kin, legatees, heirs, or devisees, are liable for demands against the decedent, as prescribed in this article, they must give preference in the payment thereof, and they are so liable therefor, in the order prescribed by law, for the payment of debts by an executor or administrator. Preference of payment cannot be given to a demand, over another of the same class, except where a similar preference by an executor or administrator is allowed by law. The commencement of an action, under any provision of this article, does not entitle the plaintiff's demand to preference over another of the same class, except as otherwise specially prescribed by law.

§ 1856. Defence, by reason of other prior or equal claims.

Where it appears, in an action brought as prescribed in this article, that there are unsatisfied demands against the decedent's estate, of a class prior to that of the plaintiff's demand, the defendant is entitled to judgment, if the value of the property, which was received, devised, or inherited, as the case may be, by the class to which he belongs, does not exceed the amount of the valid demands of a prior class. If it exceeds the amount of those demands, the judgment against the defendant cannot exceed such a proportion of the plaintiff's demand as the total amount of the valid demands of his class bears to the excess.

§ 1857. Id.; when such a claim is paid.

Where a defendant, or a person belonging to his class, has paid a demand against the decedent's estate, of a class prior to that of the plaintiff's demand, or has paid a demand of the same class, the amount of the demand so paid must be estimated, in ascertaining the amount to be recovered, as if it was outstanding and unpaid.

§ 1858. Action not suspended by infancy.

An action against heirs or devisees, brought as prescribed in this article, is not delayed, nor is the remedy of the plaintiff suspended, by reason of the infancy of any of the parties; except that an execution shall not be issued against an infant heir or devisee, until the expiration of one year after final judgment is rendered, and the judgment-roll filed.

§ 1859. This article not applicable, where will charges real property, etc.

This article does not affect the liability of an heir or devisee, for a debt of a testator, where the will expressly charges the debt exclusively upon the real property descended or devised, or makes it payable exclusively by the heir or devisee, or out of the real property descended or devised, before resorting to the personal property, or to any other real property descended or devised.

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§ 1860. One action, where same person is heir, devisee, etc.

Where a person, who takes real property of a decedent by devise, and also by descent; or who takes personal property as next of kin, and also as legatee; or who takes both real and personal property in either capacity; or who is executor or administrator, and also takes in either of the before mentioned capacities; would be liable in one capacity, for a demand against the decedent, after the exhaustion of the remedy against him in another capacity; the plaintiff, in any action to charge him, which can be maintained, without joining with him any other person, except a person whose liability is in all respects the same, may recover any sum, for which he is liable, although the remedy against him in another capacity was not exhausted. But this section does not increase the sum, which the plaintiff is entitled to recover against him, in the capacity in which he is actually liable; nor does it charge a defendant individually, who is liable only in a representative capacity.

Where legacies are made a charge upon property devised, a purchaser is held to take with notice of such specific lien, and it is his duty to see that the lien is discharged, but when no provision is made for the payment thereof, the purchaser can, after the expiration of the three years, take the estate free and discharged therefrom. *Jewett v. Kcenholts*, 16 Barb. 193; *Waring v. Waring*, 3 Abb. 246; *Hyde v. Tanner*, 1 Barb. 75; *Smith v. Soper*, 32 Hun, 46. A judgment against the heir or devisee will be preferred as a lien upon the land so descended or devised to the defendant, to a judgment debt, although it will not affect the title of a purchaser in good faith, and for value acquired before notice of pendency of the action is filed or final judgment entered. *Hamilton v. Smith*, 12 St. Rep. 713, reversed, 110 N. Y. 159, 17 St. Rep. 146.

A suit against a decedent's personal representatives upon a contract made with such representatives, cannot be joined with an action under the statute against the heirs to charge his lands. In an action by a creditor of a deceased person to charge his heirs, they must be sued jointly; but under no circumstances are they liable for debts incurred by the executors. *Hayward v. McDonauld*, 7 Civ. Pro. R. 100. Although a defendant in an action to charge the heir is entitled to protection under § 1853, yet if the complaint alleges him to be a purchaser with notice of plaintiff's claim, it cannot be presumed, on demurrer, that the land devised to him cannot be sold to satisfy plaintiff's claim. *Hauselt v. Fine*, 3 St. Rep. 191. Lands aliened in good faith by a devisee or heir-at-law, before the commencement of a suit against him for the recovery of a debt from the testator or intestate, are not liable

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for the payment of such debt. *Wambaugh v. Gates*, 11 Paige, 505. It is said by the codifiers that § 1853 is remodeled in accordance with the construction given to the Revised Statutes in *Waring v. Waring*, 3 Abb. 246. See, also, *Hyde v. Tanner*, 1 Barb. 75. And that the rule to be deduced from these cases is, that the good faith of which the statute speaks is that of the purchaser, and not of the heir or devisee.

Section 1853 protects purchasers in good faith and for value of premises against which the debt of the deceased person was sought to be enforced, and it is the plaintiff's right to have the purchasers made parties in order to have it determined in the action whether they or any of them were entitled to the protection of the statute. *Rogers v. Patterson*, 87 Hun, 219.

The complaint by a judgment-creditor need not set out the evidence by which plaintiff expects to prove his inability to collect his debt against the executor. *Hauselt v. Fine*, 18 Abb. N. C. 142, 3 St. Rep. 191.

The design of 1 R. S. 749, § 4, was not to create a personal liability of the heir for the amount of the mortgage debt, but to make, so far as practicable, the realty primarily chargeable with the payment of a debt of the decedent secured by a mortgage on his land, and when, with the mortgaged premises, the heir inherits other lands of the same ancestor, he takes with them the burden of the mortgage debt, if there was a personal liability of the decedent to pay at the time of the decease. The liability of the heirs to pay the mortgage out of the property is proportionate with the real estate inherited by them respectively, and the judgment must be entered and execution issued accordingly. It is only when the land has been aliened by the heirs that they are personally liable for an amount exceeding its value. When the land has not been aliened the remedy is by action in equity, in the nature of a proceeding to reach the land. *Hauselt v. Patterson*, 36 St. Rep. 354, 124 N. Y. 349.

CHAPTER XXIV.

ACTION TO ESTABLISH OR IMPEACH A WILL.

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ARTICLE I.

WHEN ACTION WILL LIE. § 1861.

§ 1861. When action to establish a will may be brought.

An action to procure a judgment, establishing a will, may be maintained, by any person interested in the establishment thereof, in either of the following cases:

1. Where a will of real or personal property, or both, has been executed, in such a manner and under such circumstances, that it might under the laws of the state, be admitted to probate in a surrogate's court; but the original will is in another state or country, under such circumstances that it cannot be obtained for that purpose; or has been lost or destroyed, by accident or design, before it was duly proved and recorded within the state.

2. Where a will of personal property made by a person who resided without the state, at the time of the execution thereof, or at the time of his death, has been duly executed, according to the laws of the state or country in which it was executed, or in which the testator resided at the time of his death, and the case is not one where the will can be admitted to probate in a surrogate's court, under the laws of the state.

This section is in the main a re-enactment of some of the sections of title 1, chapter 6, part 2, R. S. A Surrogate's Court has

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jurisdiction to entertain proceedings for the probate of a will which is not produced before the surrogate for the reason that it is in possession of a foreign court, which will not suffer it to be removed from its files. The fact that the Code confers upon the Supreme Court jurisdiction over the probate of a will "which is in another State or country under such circumstances that it cannot be obtained" for the purpose of being admitted in a Surrogate's Court, does not deprive the Surrogate's Court of jurisdiction. *Estate of Delaplaine*, 12 Civ. Rep. 35, following *Russell v. Hartt*, 87 N. Y. 19. Where the complaint alleged that the testator signed, published, delivered and executed his will and codicil in Spain before a notary and three witnesses, and that such will and codicil had been duly recorded by the notary and published in his register, and that they remained on file in the archives of his office, from which they could not be removed for any purpose whatever, and the copies of the will and codicil, annexed to the complaint, showed that each of these instruments was subscribed by the testator, the witnesses and the notary, the complaint was held to state a cause of action. An averment that deceased was an inhabitant of and domiciled in this State, but temporarily residing in Spain, at the time of the execution of the will, are sufficient. *Younger v. Duffie*, 28 Hun, 242, affirmed, 94 N. Y. 535. Where circumstances exist, by reason of which the will could not be admitted to probate in a Surrogate's Court, the Code expressly provides that an action may be maintained for the purpose of establishing it. *Russell v. Hartt*, 13 Week. Dig. 309; s. c. 87 N. Y. 19; *Caulfield v. Sullivan*, 85 N. Y. 153.

Section 1861 does not apply to wills which have been duly proved. It is an enactment of the Revised Statutes by which it appears that the term "establishing a will" means the same as proving a will, and such is the obvious meaning of the term as used in this section of the Code, which has no relation to wills which have been duly proved; the Code provides a complete scheme by article 7, title III, chapter 18, for establishing and giving effect within this State to wills duly probated in other States. *Clark v. Poor*, 56 St. Rep. 122.

Art. 1. When Action Will Lie.

Complaint, Praying Establishment of Will.

NEW YORK SUPREME COURT.

MARIA DE LA SALUD OVIEDO YOUN-
GER, PLAINTIFF,*agst.*MARY ANN PELTON DUFFIE AND DAN-
IEL P. DUFFIE, DEFENDANTS.

94 N. Y. 535.

The plaintiff for a complaint, complaining of the defendants herein, respectfully shows to this court and avers:

1. That General Alfred N. Duffie, late United States consul at Andalusia, in the kingdom of Spain, temporarily residing at Cadiz in said kingdom, but an inhabitant of and domiciled at West Brighton, in the county of Richmond, and State of New York, died on the 8th of November, A. D. 1880, at the said city of Cadiz, and that he was at the time of his death possessed of personal property within the State of New York.

2. That this plaintiff is a legatee under the last will and testament and the codicil thereof of said deceased, and has an interest thereunder to the extent of \$20,000 and upwards.

3. That prior to his death and on or about the 28th day of January, 1880, the said Alfred N. Duffie, at the said city of Cadiz, in the said kingdom of Spain, duly signed, published, declared and executed before Ricardo de pro y Jajardo, a notary of the illustrious college of Seville, and in the presence of and with three witnesses, namely, Salvador de Asprez Salvador, Ramirez de Arellano and Manuel Cruelles, all residents of Cadiz aforesaid, his last will and testament, and still later, to-wit, on the 1st day of May, 1881, before said notary and the same three witnesses, said deceased also signed, published, declared and executed a codicil thereto, a copy of which last will and testament, together with the codicil thereof, is hereto annexed, and to be taken as part of this complaint, the original will and codicil being in the Spanish language and in the said kingdom of Spain, under such circumstances they cannot be obtained, and the said copy hereto annexed is a true and faithful translation thereof.

4. That the said last will and testament and said codicil were duly executed as aforesaid, as an open will and codicil thereto, in conformity with the laws of Spain, and were duly recorded by said notary in his register or protocol, and remain on file among the archives of his notarial office, at the said city of Cadiz, from which the same cannot, by reason of the laws of Spain, be taken for purpose of being admitted to probate under the laws of the State of New York, or for any other purpose whatsoever. That the laws of Spain regulating the execution of said will and codicil and the recording of the same, are as follows:

Law I, title XVIII, liber X Novissimo Recopilacion: If any one executes his last will and testament before a notary public, it shall

Art. 2. Proof Necessary to Establish Lost Will.

be so done in the presence of at least three witnesses of the vicinity or neighborhood where the same shall be executed; and Law II, title XVIII, liber X, id.: And in the codicils the same solemnity required for the execution of an open last will and testament, shall be observed; and Laws I, IV, and VI, title XXIII, liber X, id.: The public instruments are to be written and executed in the notarial register or protocol which the notary is bound to keep and which must always remain under his custody, and he cannot deliver the said public instruments so executed, but will give copies of the same duly compared or authenticated; and Law VII, title XXIII, liber X, id.: Classes an open will executed before a notary and witnesses and filed in the notarial office in his register or protocol, as a public instrument.

5. That the said last will and testament and codicil were never revoked, canceled or annulled, either by the said testator or by any judgment or operation of law.

6. That the said last will and testament and codicil have not been proved or recorded within the State of New York.

7. That the defendant, Mary Ann Pelton Duffie, is the widow of said deceased and is named as executrix in said will, but that she has declined and still continues to decline to proceed with the probate thereof, and that the defendant, Daniel P. Duffie, is the only next of kin of said testator and has some interest under said will; that no letters of administration have been issued or applied for nor has the estate of said testator been administered upon in this State or elsewhere.

Wherefore, the plaintiff demands judgment against the defendants that the said will and codicil be established and proved as the last will and testament and codicil thereto of the said Alfred N. Duffie, deceased, and be admitted to probate as a will of personal property or estate; that letters testamentary thereon be issued to Mary Ann Pelton Duffie, the executrix named therein, or in the event of her declining to act, that letters of administration with the will annexed be issued therein to this plaintiff or to the person entitled thereto, out of the Surrogate's Court of the county of Richmond; wherein the said Alfred N. Duffie was domiciled at the time of his death and where property belonging to him was then and still is situated, and for such other and further relief as may be just, together with the costs in this action.

OLCOTT & MESTRE,
Plaintiff's Attorneys.

ARTICLE II.

PROOF NECESSARY TO ESTABLISH LOST WILL. § 1865.

§ 1865. Proof of lost will in certain cases.

But the plaintiff is not entitled to a judgment, establishing a lost or destroyed will, as prescribed in this article, unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness.

ART. 2. Proof Necessary to Establish Lost Will.

In order to establish an instrument as the last will pursuant to § 1861, etc., it is incumbent upon the plaintiff to establish that the will was in existence at the time of the death of the alleged testator, or that it was fraudulently destroyed in his life time. *Perry v. Perry*, 49 St. Rep. 291, 21 Supp. 133.

To establish a lost or destroyed will, its execution and validity must be shown, its contents by two witnesses at the time of the death of testator, and its subsequent loss. *Grant v. Grant*, 1 Sandf. Ch. 235. In *Everitt v. Everitt*, 41 Barb. 385, the practice and rules of evidence, upon a proceeding to establish a lost will, are discussed, and rules laid down as to what will be deemed sufficient proof of the execution and provisions of the will. The case is one of secondary evidence exclusively. Proof will be received to supply the imperfection of memory of the subscribing witnesses. In a proceeding instituted in a Surrogate's Court to establish a lost will, it appeared a will had been duly executed and published by the testatrix, and that she had taken the same in her own custody, and it did not appear that it was seen by any other person prior to her death. On the trial, evidence of declarations of testatrix, made from time to time up to a short time previous to her death, to the effect that she had made a will and that by it she gave her property to her granddaughter, *held*, competent. It could not have been proved as a lost or destroyed will unless shown to have been in existence at the time the testatrix died, or to have been fraudulently destroyed in her lifetime. *Matter of Marsh*, 45 Hun, 107, citing *Betts v. Jackson*, 6 Wend. 173; *Idley v. Bowen*, 11 Wend. 236; *Knapp v. Knapp*, 10 N. Y. 276. Where a will has been lost or destroyed under circumstances showing it has not been lost or destroyed with the knowledge or consent of testator, the fact of its legal existence at the death of testator may be shown by circumstances. Where it is proved that the will, at the time of its execution, was placed by the testator in the hands of a custodian to keep; who testifies that he took charge of the same and locked it up in a trunk, and supposed it was there at the time of the testator's death, but on search it could not be found, the evidence of its legal existence is sufficient. If, under such circumstances, the will was not in existence at the death of the testator, it becomes evident that it was fraudulently destroyed or lost during the lifetime of the testator, in which case it was his

Art. 3. Contents of Judgment.

last will and testament. *Schultz v. Schultz*, 35 N. Y. 653. A will, destroyed by a testator under undue influence, and in belief of a fraudulent statement, is fraudulently destroyed, within the statute. *Voorhees v. Voorhees*, 39 N. Y. 463. A destruction of a will by a testator's direction and in his presence is not fraudulent. *Timon v. Claffy*, 45 Barb. 438. Where a will is destroyed without the testator's consent or knowledge and in his lifetime it is fraudulent. *Early v. Early*, 5 Redf. 376. If the will appears to have been in existence at testator's death, its loss is material to be proved. The witnesses must be required to testify, at least, to the substance of the will; *McNally v. Brown*, 5 Redf. 372; but the spirit of the law is complied with when proof is made, as required, of the provisions which affect the disposition of testator's property. *Early v. Early*, 5 Redf. 376. It is said that the proof required only relates to the action provided for by the statute, and does not apply to an action for partition. *Harris v. Harris*, 26 N. Y. 433. If the two witnesses differ materially as to the beneficiary or amount of bequests, the will cannot be established on their testimony. *Sheridan v. Houghton*, 6 Abb. N. C. 234.

To sustain an action to establish a lost will, proof must be clear and convincing, not only in respect to its provisions and execution, but also that it was in existence at the time of the alleged testator's death. *Kahn v. Hoes*, 14 Misc. 63.

This section is to be liberally construed. *Hook v. Pratt*, 8 Hun, 102, citing *Matter of De Groot*, 18 Civ. Pro. R. 102.

This section has not changed the rule at common law that in an action where the plaintiff sought to establish his title to realty through a will, it was sufficient to prove its due execution by one of the subscribing witnesses and the rule at common law was followed under the Revised Laws and under the Revised Statutes. *Upton v. Bernstein*, 76 Hun, 516.

ARTICLE III.

CONTENTS OF JUDGMENT. §§ 1862, 1863, 1864.

§ 1862. Judgment, that will be established.

If, in such an action, the facts necessary to establish the validity of the will, as prescribed in the last section, are satisfactorily proved, final judgment must be rendered, establishing the will accordingly. But where the will of a person, who was a resident of the state at the time of his death, is established as prescribed in the last section, the judgment establishing it does not affect the con-

 Art. 4. Action to Construe Will and Effect of Article.

struction or validity of any provision contained therein; and such a question arising with respect to any provision, must be determined in the same action, or in another action or a special proceeding, as the case requires, as if the will was executed within the state.

§ 1863. Judgment admitting the will to probate.

Where the parties to the action, who have appeared or have been duly summoned, include all the persons who would be necessary parties to a special proceeding, in a surrogate's court, for the probate of the same will and the grant of letters thereupon, if the circumstances were such that it could have been proved in a surrogate's court; the final judgment, rendered as prescribed in the last section, must direct, that an exemplified copy thereof be transmitted to the surrogate having jurisdiction, and be recorded in his office; and that letters testamentary, or letters of administration with the will annexed, be issued thereupon from his court, in the same manner, and with like effect, as upon a will duly proved in that court.

§ 1864. Contents of judgment; surrogate's duty.

A copy of the will so established, or, if it is lost or destroyed, the substance thereof must be incorporated into a final judgment, rendered as prescribed in the last section; and the surrogate must record the same, and issue letters thereupon, as directed in the judgment.

ARTICLE IV.

ACTION TO ESTABLISH AND CONSTRUE WILL AND EFFECT OF ARTICLE. §§ 1866, 1867.

§ 1866. Action to establish, etc., will, relating to real property.

The validity, construction, or effect, under the laws of the state, of a testamentary disposition of real property situated within the state, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. The judgment in such an action may perpetually enjoin any party from setting up or from impeaching the devise, or otherwise making any claim in contravention to the determination of the court, as justice requires. But this section does not apply to a case where the question in controversy is determined by the decree of a surrogate's court, duly rendered upon allegations for that purpose, as prescribed in article first of title third of chapter eighteenth of this act, where the plaintiff was duly cited in the special proceeding in the surrogate's court, before the commencement of the action.

§ 1867. Retrospective effect of this article.

The provisions of this article apply as well to wills made before, as to those made after, this article takes effect.

The complaint in an action for the construction of a will alleged the death of the testator and admission of the will to probate, that the plaintiff, son of testator, and his wife, the defendant,

Art. 4. Action to Construe Will and Effect of Article.

were the only next of kin and heirs at law. Plaintiff, at time of death of testator, was a minor, but at time of commencement of this action was of full age. Plaintiff and defendant were in possession of the real estate and proceeds of personal; the terms of the will were neither plain nor simple; the testator sought to devise his real estate, or some interest therein, to other persons than his heir-at-law, and if such provisions were valid, it would deprive the heir of an estate therein which would have descended to him if testator had died intestate; *held*, that the court had jurisdiction under this section to interpret the will, on application of the heir-at-law, and adjudge whether any of the devises were void and the nature and character of the interests devised. *Adams v. Becker*, 13 St. Rep. 42, distinguishing *Hovey v. Purdy*, 10 St. Rep. 90, holding that an action for construction of a will cannot be maintained by a legatee or devisee, and citing as in point *Jones v. Jones*, 1 How. 310; *Marvin v. Marvin*, 11 Abb. (N. S.) 102; *DeBussierre v. Holladay*, 55 How. 220; *Weed v. Cantwell*, 36 Hun, 528. The later authorities holding that an action for construction cannot be maintained by a legatee or devisee are *Wager v. Wager*, 89 N. Y. 161; *Weed v. Weed*, 94 N. Y. 243. Chapter 316, Laws of 1879, relative to disputed wills, is repealed by implication by §§ 1866, 1867. Under § 1866 there must be some color of a question for construction before a court can be called upon to construe a devise in a will. The testamentary disposition of real property, or of an interest therein, the validity, construction or effect of which may be construed under § 1866, and where its invalidity is sought to be determined, must be a disposition of some interest in real estate which may possibly be enjoyed in actual possession, if the invalidity of such disposition be decreed during the lifetime of the person who seeks the aid of the court in construing the devise. *Horton v. Cantwell*, 108 N. Y. 255. In *Drake v. Drake*, 41 Hun, 366, the same cases are cited as in *Adams v. Becker*, 13 St. Rep. 42, *supra*, as is also *Tiers v. Tiers*, 98 N. Y. 568, to the proposition that the court has jurisdiction in such cases even without the statute. In an action under this section the defeated party is not entitled, of course, to a new trial as in ejectment. *Marvin v. Marvin*, 11 Abb. (N. S.) 102. The devisee of a life estate has a right to bring an action for the construction of a will. *Jones v. Jones*, 1 How. (N. S.) 510. The decree of a surrogate, admitting a will to probate, cannot be questioned in

Art. 4. Action to Construe Will and Effect of Article.

an action to construe a will, upon the ground that the decedent was not a resident of the county of the surrogate when he died. *Woodward v. James*, 16 Abb. N. C. 246.

An action for construction of a will purporting to create a trust may be maintained by persons interested in the estate whether they seek to maintain such trust or to destroy it. *Simmons v. Burrell*, 8 Misc. 388, 59 St. Rep. 554, 28 Supp. 625.

In *Rausch v. Rausch*, 64 St. Rep. 490, Cullen, J., at Special Term, says: "I regard *Mellen v. Mellen*, 139 N. Y. 210, 54 St. Rep. 670; *Anderson v. Anderson*, 112 N. Y. 104, 20 St. Rep. 344, as conceding it may be, rather than deciding, that an action to construe a will can be maintained under § 1866 of the Code."

In *Smith v. Hilton*, 50 Hun, 236, it was held that this section provided for the maintenance of an action to test the validity of the testamentary disposition of property within this State, or of any interest therein in like manner, or of an action to determine the validity of a deed for the conveyance of land, but it was held not to apply to the facts of that case.

The words of this statute are very broad and comprehensive in their meaning and no doubt can be entertained as to the intention of the Legislature. The validity, construction and effect of a testamentary disposition of real estate or any interest in such property, which would descend to the heirs of an intestate, may be determined in like manner as the validity of a deed. *Adams v. Becker*, 47 Hun, 65.

It seems that an action cannot be maintained to reform a will under this section, where it appeared that the husband and wife intended to make wills, each in favor of the other, and that, by mistake, each signed and executed the will of the other. The action contemplated by this section was one directed only to the determination of the validity of the disposition in an existing will and not to the validity of the will itself. *Nelson v. McDonald*, 61 Hun, 406.

Where a party holds or claims to have a purely legal estate in land and simply seeks to have his title adjudicated upon, or to recover possession against an adverse claimant who also relies upon an alleged legal title, there being no equitable feature of fraud, mistake or other fact calling for the application of equitable doctrines or the granting of peculiar equitable relief, the remedy at law is adequate and the concurrent jurisdiction of

Art. 4. Action to Construe Will and Effect of Article.

equity does not exist. This rule is not changed by § 1866. *Whitney v. Whitney*, 63 Hun, 59. A devisee who claims a mere legal estate in real property of the testator where there is no trust, must assert his title by ejectment or other legal action, or if in possession of the property, must await an attack upon such possessions and set up the devise to himself in answer to the hostile claim. *Anderson v. Appleton*, 48 Hun, 534. *Nelson v. McDonald*, 41 St. Rep. 1, 16 Supp. 273, cites the opinion of Peckham, J., in *Anderson v. Anderson*, 112 N. Y. 104, 20 St. Rep. 344, construing the section as follows: "This language would seem to provide for the case of a devise contained in an instrument where due and proper execution is assumed, but which devise was to be adjudged good or bad as it should be determined that it was in accord with or against the law on the subject of such devise."

An heir of a testator may maintain an action in equity against a devisee out of possession, and other parties in interest, to declare void a devise of a vested remainder in real property, though no trust is involved. Such an action is not one to obtain a construction of any provision of the will, or to determine the legal title to real estate in possession of such devisee, but its purpose is to remove a cloud on the title of the heirs, who, if the devise is set aside, will have a vested remainder. *Hemmje v. Meinen*, 20 Supp. 619. The jurisdiction of a court of equity to entertain an action on behalf of the next of kin of a testator, for a construction of the will disposing of personal estate, where the disposition made by the testator is claimed to be invalid, was maintained in *Wager v. Wager*, 89 N. Y. 161, and in *Holland v. Alcock*, 108 N. Y. 312. Section 1866 has extended the remedy so as to include suits for the construction of devises in behalf of heirs claiming adversely to the will, and it would not be consistent with the spirit of this legislation to narrow the jurisdiction in cases of bequests of personalty. *Read v. Williams*, 125 N. Y. 560, 35 St. Rep. 909.

The power of a court over actions for the construction of wills has been extended by this statute, and they may be brought in many cases in which, before the statute, the court would have declined jurisdiction. *Mellen v. Mellen*, 193 N. Y. 210, citing *Horton v. Cantwell*, 108 N. Y. 255; *Anderson v. Anderson*, 112 N. Y. 104. Courts of equity have no inherent jurisdiction to entertain

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an action to establish an action by a devisee of the legal estate in possession of the property devised, to establish the will against the heirs-at-law, nor is this power given by §§ 1866 and 1867. These provisions refer not to the validity of the will making the disposition, but simply to the validity of the disposition so made. It seems the policy of this State is to commit to the courts of probate the decision of questions arising upon the execution of an alleged will, and it is only in special and exceptional cases that a court of equity will interfere. *Anderson v. Anderson*, 112 N. Y. 104.

Mellen v. Mellen, 139 N. Y. 210, holds that there is no inherent power vested in courts of equity to construe devises as a distinct and independent branch of jurisdiction, but they exercise this jurisdiction only as an incident to their jurisdiction over trusts, that a person not an heir-at-law or devisee, but who claims as purchaser simply, cannot, under § 1866, maintain an action for the construction of a will. This case is cited in *Washbon v. Cope*, 144 N. Y. 287.

Under this section jurisdiction is conferred upon the Supreme Court upon an application of an heir-at-law to interpret the will and to adjudge whether any of several devises were void, and to determine the nature and character of the interest of the several devisees in the real estate of which the testator died seized. It is not necessary that there should have been created by the will a trust in order to enable parties beneficially interested in such will to bring an action for its construction. *Adams v. Becker*, 47 Hun, 65, 13 St. Rep. 41; s. c. 28 St. Rep. 910. In *Anderson v. Anderson*, 112 N. Y. 104, it is said that the holding in 47 Hun, 65, is simply that an action can be brought for the construction of a disputed and doubtful devise contained in a will, although no trust is created therein, and queries whether the section has wrought such change in the will upon that subject, holding that question was not before the court. In *Whitney v. Whitney*, 63 Hun, 59, it is said that *Horton v. Cantwell*, 108 N. Y. 255 and *Anderson v. Anderson*, 112 N. Y. 104, seem to recognize the rule as it previously existed. *Whitlock v. Forfar*, 15 St. Rep. 556, cites *Adams v. Becker*, 47 Hun, 65, 13 St. Rep. 41; s. c. 28 St. Rep. 910, *supra*, with approval.

In *Matter of Marcial*, 37 St. Rep. 569, 15 Supp. 89, the opinion discusses the effect of this section, citing Throop's note thereto.

Art. 4. Action to Construe Will and Effect of Article.

In an action brought solely for the construction of a will, the court has no power to construe an independent business agreement. *Montignani v. Blade*, 145 N. Y. 111, 39 N. E. Rep. 17, 64 St. Rep. 558, modifying 74 Hun, 297, 56 St. Rep. 269, 26 Supp. 670. Equity has jurisdiction of an action to construe a will where it is necessary to pass on the validity and effect of a trust contained therein. *Simmons v. Burrell*, 59 St. Rep. 554.

Chapter 316 of the Laws of 1879, providing for the establishment and probate of wills in the Supreme Court, was repealed by §§ 1866 and 1867. *Colby v. Colby*, 81 Hun, 221, 30 Supp. 677, 62 St. Rep. 631, 24 Civ. Pro. R. 148, citing *Horton v. Cantwell*, 108 N. Y. 255; *Anderson v. Anderson*, 112 N. Y. 104.

Complaint by Heirs for Construction of Will.

NEW YORK SUPREME COURT — CITY AND COUNTY OF NEW YORK.

Thomas T. Read, Josephine A. Habirshaw, Adelaide Habirshaw and Mary A. Skidmore

agst.

George C. Williams and William J. Quinlan, Jr., as Executors and Trustees under the last Will and Testament of Catherine M. McCoskey, Deceased, Mary R. Haddock, Kate Haddock and John Hall.

125 N. Y. 563.

The plaintiffs above named, complaining of the defendants, respectfully show the court:

1. That Catherine M. McCoskey, late of the city, county and State of New York, died on or about the 22d day of April, 1886, without issue and leaving no father or mother, but leaving these plaintiffs and the defendant Mary R. Haddock, her nieces and nephew, and Kate Haddock, sole child of Arba Haddock, a deceased nephew, her only heirs-at-law and next of kin. That thereupon, as such heirs-at-law and next of kin, the plaintiffs and said Mary R. Haddock and the said Kate Haddock became entitled to the estate of the said Catherine M. McCoskey not legally otherwise disposed of by her last will and testament.

2. That at the time of her death, said Catherine M. McCoskey was seized and possessed of certain real and personal estate situated within this State, to the amount and value, as the plaintiffs are informed and verily believe, of \$500,000 and upwards.

3. That the said Catherine M. McCoskey left a last will and testament, dated the 30th day of September, 1884, and two codicils thereto, bearing date, respectively, the 31st day of December, 1885, and 12th day of April, 1886, which last will and testament and the codicils thereto were duly admitted to probate as a will of real and

Art. 5. Action to Determine Validity of a Will.

personal property by the surrogate of the county of New York, on the 4th day of February, 1887.

4. That in and by said last will and testament, the defendants George C. Williams and William J. Quinlan, Jr., were appointed the executors and trustees thereof and have duly qualified and entered upon the discharge of the duties of their said office. That the defendant John Hall is mentioned in connection with one of the trusts hereinafter set forth and is made a party hereto for that reason, that there are no legatees mentioned in said will and codicils thereto who are interested in the provisions of the will herein prayed to be declared invalid except plaintiffs themselves.

5. That annexed hereto and made a part of this complaint is a copy of said last will and testament and the codicils thereto, marked exhibit "A."

6. That the plaintiffs are advised by counsel and verily believe that the provisions of said will and codicils hereinafter set forth are indefinite and uncertain in their subjects and objects, invalid and unauthorized by law and unlawfully suspend the absolute power of alienation of such portions of the estate as are embraced therein, and they hereby allege, on information and belief, that the said provisions are and each of them is illegal and invalid in law.

7. That the following provisions are those referred to in the preceding paragraph of this complaint, namely, paragraph 3 of the original will, paragraph 2 and paragraph 2 of the last codicil.

(Insert.)

Wherefore, the plaintiffs pray judgment adjudging and decreeing that the said several devises and bequests embraced in said clauses of said will hereinafore set forth, were, on the death of the said Catherine M. McCoskey, and each of them was and is illegal and void and of no effect, and that in respect to the said property therein mentioned, the said Catherine M. McCoskey died intestate, and the said property and each and every part thereof, at the death of the said testatrix, vested in these plaintiffs and the defendants Mary R. Haddock and Kate Haddock, the only heirs-at-law and next of kin of the said Catherine M. McCoskey, deceased, entitled thereto.

That the said executors and trustees may be required to account for all that portion of said estate which may be remaining in their hands after paying the several bequests and establishing the several special trusts provided for in said will, other than those attempted to be created by said provisions of said will hereinabove set forth and to pay unto the plaintiffs their proper proportions thereof and for such other further relief as to the court may seem proper.

JACKSON & INGRAHAM,

Attorneys for Plaintiffs.

ARTICLE V.

ACTION TO DETERMINE VALIDITY OF A WILL.

§ 2653 a. [Am'd, 1896.] Determining validity of a will.

Any person interested in a will or codicil admitted to probate in this state, as provided by the code of civil procedure, may cause the validity of the probate

Art. 5. Action to Determine Validity of a Will.

thereof to be determined in an action in the supreme court for the county in which such probate was had. All the devisees, legatees and heirs of the testator and other interested persons, including the executor or administrator, must be parties to the action. Upon the completion of service of all parties, the plaintiff shall forthwith file the summons and complaint in the office of the clerk of the court in which said action is begun, and the clerk thereof shall forthwith certify to the clerk of the surrogate's court in which the will has been admitted to probate, the fact that an action to determine the validity of the probate of such will has been commenced, and on receipt of such certificate by the surrogate's court, the surrogate shall forthwith transmit to the court in which such action has been begun, a copy of the will, testimony and all papers relating thereto, and a copy of the decree of probate, attaching the same together and certifying the same under the seal of the court. The issue of the pleadings in such action shall be confined to the question of whether the writing produced is or is not the last will and codicil of the testator, or either. It shall be tried by a jury and the verdict thereon shall be conclusive as to real and personal property, unless a new trial be granted or the judgment thereon be reversed or vacated. On the trial of such issue, the decree of the surrogate admitting the will or codicil to probate shall be *prima facie* evidence of the due attestation, execution and validity of such will or codicil. A certified copy of the testimony of such of the witnesses examined upon the probate, as are out of the jurisdiction of the court, dead, or have become incompetent since the probate, shall be admitted in evidence on the trial. The party sustaining the will shall be entitled to open and close the evidence and argument. He shall offer the will in probate and rest. The other party shall then offer his evidence. The party sustaining the will shall then offer his other evidence and rebutting testimony may be offered as in other cases. If all the defendants make default in pleading, or if the answers served in said action raise no issues, then the plaintiff may enter judgment as provided in article two of chapter eleven of the code of civil procedure in the case of similar defaults in other actions. If the judgment to be entered in an action brought under this section is that the writing produced is the last will and codicil, or either, of the testator, said judgment shall also provide that all parties to said action, and all persons claiming under them subsequently to the commencement of the said action, be enjoined from bringing or maintaining any action or proceeding, or from interposing or maintaining a defence in any action or proceeding based upon a claim that such writing is not the last will or codicil, or either, of the testator. Any judgment heretofore entered under this section determining that the writing produced is the last will and codicil, or either, of the testator, shall, upon application of any party to said action, or any person claiming through or under them, and upon notice to such persons as the court at special term shall direct, be amended by such court so as to enjoin all parties to said action, and all persons claiming under the parties to said action subsequently to the commencement thereof, from bringing or maintaining any action or proceeding impeaching the validity of the probate of the said will and codicil, or either of them, or based upon a claim that such writing is not the last will and codicil, or either, of the testator, and from setting up or maintaining such impeachment or claim by way of answer in any action or proceeding. When final judgment shall have been entered in such action, a copy thereof shall be certified and transmitted to the clerk of the surrogate's court in

Art. 5. Action to Determine Validity of a Will.

which such will was admitted to probate. The action brought as herein provided shall be commenced within two years after the will or codicil has been admitted to probate, but persons within age of minority, of unsound mind, imprisoned, or absent from the state, may bring such action two years after such disability has been removed.

In *Long v. Rogers*, 79 Hun, 441, Bartlett, J., in discussing the purpose of this section, says, "As to the legislative intent, we think there can be no doubt; it was to afford relief where relief was needed, namely with regard to real estate, not to uproot a system of long standing and wholesome operation with regard to personalty. * * * What was needed was some way of making a probate conclusive as to realty within a reasonable time, and for this the new section provided." It is further held that the intention was to embrace this section within the existing system, not to substitute it therefor; that as to personalty the function of existing statute continues, but this does not conflict with the function of the new section which operates upon real estate and affords a practical method of making that conclusive which otherwise would remain indefinitely presumptive. It does not authorize a person who has omitted to apply for revocation within the year, and as against whom the probate has become conclusive, to inaugurate a fresh contest thereafter.

In *Hawke v. Hawke*, 82 Hun, 439, it is said that § 2653a must be read in connection with other sections of the Code, and also in connection with what existing laws have determined a trial by jury to be, and that upon such trial the court may direct a verdict to be rendered by a jury the same way as in any other action. The same rule is held in *Katz v. Schnaier*, 87 Hun, 343, which holds further that where no real estate passes under a will, an action to vacate a probate thereof must be begun within one year after the probate, citing *Long v. Rogers*, 79 Hun, 441, *supra*.

Lewis v. Cook, 89 Hun, 183, holds that § 2653a applies to all wills and codicils, whether real or personal property, and to wills which were proved after the passage of the act, even though the testator died before its passage; but this is reversed in the Court of Appeals, 150 N. Y. 163, which holds that previous to the enactment of this section there was no way by which the validity of a will and its probate could be once and for all established and placed beyond the attack by the heirs-at-law. Its object was to expedite the settlement of estates and conclude all persons interested. The section was added to the article in

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which it is placed and was not intended to substitute it or the existing scheme regulating the manner in which the persons interested in the estate of the decedent might question the probate of a will. It does not apply to a person not named in the will and who takes no benefit or advantage under it. His interest is in oppositon to the will. 54 Alb. Law J. 280.

Where the complaint in an action to determine the validity of a will has not been filed with the clerk of the court, or notice thereof given to the clerk of the Surrogate's Court, or the surrogate has not transmitted the will and proof, the remedy is by motion at Special Term to supply the omission, and not by motion to dismiss at the trial. The complaint in an action to determine the validity of a will need not contain matters relative to procedure which are not jurisdictional. *Johnson v. Cochrane*, 91 Hun, 165, 36 N. Y. Supp. 283, 71 St. Rep. 214.

An action under § 2653a of the Code, to test the validity of the probate of a will, may be maintained by an heir or other person interested in such will or its probate, though not named in the instrument. Section 2653a of the Code furnishes an additional remedy and applies to all wills, whether of real or personal property, or both. *Snow v. Hamilton*, 90 Hun, 157, 35 N. Y. Supp. 775, 70 St. Rep. 279.

Complaint to Determine Validity of Will.

SUPREME COURT—CLINTON COUNTY.

David F. Dobie, Individually and as Executor of
the last Will and Testament of Thomas Arm-
strong, Deceased, the Trustees of Union College
in the Town of Schenectady, Judson S. Landon,
Andrew V. V. Raymond and Sidney G. Marshall,
Plaintiffs,

agst.

Emmet Armstrong, Defendant.

The complaint of the plaintiffs shows to the court, on information and belief:

First. That Thomas Armstrong, late of Plattsburg, Clinton county, N. Y., died on or about December 31st, 1895, and that said Armstrong was, at and previous to his death, a resident of said county and left personal and real property therein.

Second. That prior to his death, he duly signed, published, declared and executed his last will and testament, to wit: a will pur-

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porting to be executed on the 9th of March, 1893, with a codicil attached thereto, and a will purporting to be executed May 15th, 1895, copies of which are hereto attached and marked "Exhibit A," and made a part of this complaint.

Third. That the said last will and testament relates to real and personal property, and that the plaintiff David F. Dobie is named as executor of said will therein, and that he, as an individual, and the said trustees of Union college, and Judson S. Landon, Andrew V. V. Raymond and Sidney G. Marshall, are the sole devisees and legatees under said will, and this defendant, Emmet Armstrong, is the sole heir-at-law of said testator.

Fourth. That the said will was duly propounded for probate to the Surrogate's Court of Clinton county on or about January 20th, 1896. That the said surrogate being disqualified to act therein, and the county judge of Clinton county being also disqualified, an order of the Supreme Court was duly made establishing the authority of Egbert C. Everest, the district attorney of said county, to act as surrogate in said proceeding.

Fifth. That the said district attorney, acting as surrogate, there-upon proceeded to take the proofs of the facts and circumstances attending the execution of said instruments, and the competency of said Thomas Armstrong to execute the same, and after due hearing and deliberation, determined and decreed that said instruments, wills and codicils were properly executed, genuine and valid, and that said Armstrong, was at the times of the execution thereof, competent to execute the same, and was not under restraint or undue influence, and admitted to probate and established the said instruments, wills and codicils as severally and collectively the last will and testament of Thomas Armstrong, and issued letters testamentary thereon to the plaintiff David F. Dobie as executor thereof.

Wherefore, plaintiffs pray the judgment of the court that the said instruments, wills and codicils are the last will and testament of Thomas Armstrong, and establishing and determining that the aforesaid probate thereof was valid.

SHEDDEN & KELLOGG,
Attorneys for Plaintiffs.

CHAPTER XXV.

GENERAL AND MISCELLANEOUS PROVISIONS RELATING TO ESTATES.

SECTIONS OF THE CODE OF PROCEDURE AND WHERE FOUND IN THIS CHAPTER.

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§ 1868. Action by child born after will, or by witness to will.

A child, born after the making of a will, who is entitled to succeed to a part of the real or personal property of the testator, or a subscribing witness to a will, who is entitled to succeed to a share of such property, may maintain an action against the legatees or devisees, as the case requires, to recover his share of the property ; and he is subject to the same liabilities, and has the same rights, and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed.

Where a testator, whose will authorized his executor to sell all his real and personal estate and dispose of the proceeds, after the making thereof had a child born, and thereafter died leaving said child his only heir-at-law and "unprovided for by any settlement, and neither provided for nor mentioned in any way in his will," *held*, that under the statute the whole real estate descended to the child the same as if the father had died intestate ; that he did not take under the will or subject to any of its provisions, and that where the executor sold the real estate, the remedy of the child was not confined to a pursuit of the proceeds of the sale, but that she could maintain ejectment to recover the property. *Smith v. Robertson*, 89 N. Y. 555.

§ 1869. [Am'd, 1895.] Receiver, as successor of surviving executor, etc.

Where the estate of a decedent has been brought under the jurisdiction of the supreme court, by an action for partition or distribution, or for the construction or establishment of a will, the court may, upon the death of the sole surviving executor, appoint a receiver of the estate, pending the action, upon such terms and conditions, and upon such notice to the parties interested, as the court directs, and upon such security, if any, as to the court seems proper. For the purpose of carrying into effect the judgment and orders of the court in relation to the estate, a receiver so appointed is the successor in interest of the surviving executor ; and has, subject to the direction of the court, the like power, as an administrator with the will annexed.

§ 1870. Next of kin defined.

The term "next of kin," as used in this title, includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife.

Section 1780 is the same in substance as the provisions of subdivision 12, § 2514, defining the meaning of the term.

The construction of the words "next of kin" is discussed very fully in *Platt v. Mickel*, 45 St. Rep. 750, citing numerous authorities and holding that a widow cannot be considered either as an heir-at law or as one of the next of kin of her husband. Among others, *Keteltas v. Keteltas*, 72 N. Y. 312, where it is said in the opinion of the court: "The objects of the testator's bounty are his next of kin, and there is nothing in the context which shows that he intended to include his widow; that she is therefore excluded is no longer an open question in this court." In *Murdock v. Ward*, 67 N. Y. 387, it was held, after review of many authorities, that where there was nothing in the context to show that the widow was intended to be included, the words "next of kin" must have their primary meaning and only include blood relations. This was followed in *Luce v. Dunham*, 69 N. Y. 36, where the claim of the widow to share in the personal estate as one of the next of kin, was again rejected. In *Tillman v. Davis*, 95 N. Y. 17, Judge Earl said: "In this State it has uniformly been held, when the question has arisen for consideration in the courts, so far as we are able to discover, that the word "heirs" applied to the succession of personal estate, means next of kin, and that the words "next of kin" do not include a widow or husband of an "intestate." The case of *Betzinger v. Chapman*, 88 N. Y. 495, is distinguished in *Platt v. Mickel*, 45 St. Rep. 750, *supra*, and it was held that it was not determined that the term "next of kin" includes the widow. In *Luce v. Dunham*, 69 N. Y. 36, reversing 7 Hun, 202, it is held, however, that a provision that the personal property of the testator shall be distributed as provided by statute in case of intestacy, includes the widow, but otherwise if the words used are "shall be distributed to the next of kin." *Keteltas v. Keteltas*, 32 N. Y. 312, *supra*.

CHAPTER XXVI.

JUDGMENT-CREDITOR'S ACTION.*

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ARTICLE I.

WHEN ACTION MAY BE MAINTAINED. §§ 1871, 1872, 1878.

SUB. 1. NATURE OF THE ACTION.

2. ACTION UNDER CODE PROVISIONS. §§ 1871, 1872.
3. ACTION IN NATURE OF CREDITOR'S BILL BY EXECUTORS AND OTHERS.
4. PARTIES PLAINTIFF.
5. PARTIES DEFENDANT.
6. PLEADINGS.
7. WHAT IS HELD TO BE PROOF OF FRAUDULENT INTENT.
8. DISCOVERY AND MISCELLANEOUS MATTERS OF PRACTICE. § 1878.

SUB. 1. NATURE OF THE ACTION.

§ 3343. Sub. 14. A "judgment creditor's action" is an action brought as prescribed in article first of title fourth of chapter fifteenth of this act, or any other action, brought by a judgment creditor to aid the collection of a judgment for a sum of money, or directing the payment of a sum of money.

The codifiers' note to the sections treated in this chapter is as follows:

"The provisions of the revised statutes did not supersede the ancient jurisdiction of the court of chancery to aid judgment-creditors, which extended to many

*The standard authorities on this subject are Bump on Fraudulent Conveyances, May on Fraudulent Conveyances, and Wait on Fraudulent Conveyances. The authorities are fully collated also in American and English Encyclopedia of Law.

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cases not embraced in those provisions. Consequently no attempt has been made in this article to define by statute the cases in which actions of that character may be maintained, or to regulate the proceedings peculiar to them. Various sections of this act preserve, in the absence of positive abrogation, the ancient equitable jurisdiction of the courts; and the former mode of exercising it when there are no statutory directions to the contrary. * * * This article, therefore, contains only the provisions of the revised statutes relating to creditor's bills adapted to the modern practice with a few additional provisions chiefly intended to render the statute more definite, and to harmonize the proceedings thereunder with the special proceedings in aid of an execution regulated by chapter 17, title 12, *post.*"

Creditor's bills are bills in equity, filed by creditors for the purpose of collecting their debts out of the real or personal property of the debtor, under circumstances in which the process of execution at common law could not afford relief; it is very ancient jurisdiction, but for its exercise the debt must be clear and undisputed and there must exist some special circumstance requiring the interposition of the court to obtain possession of and apply the property; unless the suit relate to the estate of a deceased person, the debt must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted. American & English Encyc. of Law, vol. 4, page 573.

Proceedings by way of creditor's bill as now regulated by our law and practice are generally of two kinds; the first, where it is alleged that the debtor has equitable assets which cannot be reached by an execution. In such case an execution must be issued upon the judgment, for the purpose of making the amount from the property of the debtor liable to execution, if such can be found, and returned unsatisfied if none can be found. This is a necessary preliminary. All the cases agree that no such bill can be sustained until the remedy at law has been exhausted by the return of an execution unsatisfied. The second class is based upon the allegation that the debtor possesses property which in its nature is liable to seizure and sale upon execution, but that, by fraudulent incumbrances upon the same, execution cannot be enforced. The aid of the Court of Chancery is, therefore, invoked to remove the incumbrances, that the process of law may be effectually enforced. In such case it is indispensable that the execution should have been issued, but not that it should have been returned. Its return would be fatal to the relief sought. [Note the right to maintain action conferred by chapter 314, Laws

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of 1858, as amended by chapter 740, Laws 1894. See subdivision 3 of this article.] *Mechanics & Traders' Bank of Jersey City v. Dakin*, 51 N. Y. 519, Commission of Appeals, 1873. The statement that in the class of cases named, where execution is outstanding, it would be fatal to the relief asked to have it returned, is criticised in *Royer Wheel Co. v. Fielding*, 31 Hun, 274, which case is, however, reversed, 101 N. Y. 504.

It seems the only class of cases in which a creditor's bill can be sustained are two; first, after the return of an execution wholly unsatisfied; second, while execution is outstanding in aid of it to remove obstructions. *Bowe v. Arnold*, 31 Hun, 256, citing *Bal-lou v. Jones*, 13 Hun, 629; *Thurber v. Blanck*, 50 N. Y. 80; *Fox v. Moyer*, 54 N. Y. 125; *Adsit v. Butler*, 87 N. Y. 585. Judgment-creditors, in pursuing their remedy against lands alleged to have been fraudulently conveyed, have their choice of three several proceedings. They may sell the premises by execution on the judgment, and leave the purchaser, after his title shall have become perfect by a deed from the sheriff, to contest the validity of the defendant's title in an action of ejectment; or, secondly, they may issue their execution and bring their action to remove the fraudulent obstruction, and await the result of the action before selling the property; or, thirdly, they have the right, upon the return of an execution unsatisfied, to bring an action in the nature of a creditor's bill to have the conveyance of defendant alleged fraudulent as against their judgment, and the lands sold by a receiver, or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as equitable interest and things in nature of a judgment-debtor are reached and applied to the satisfaction of judgments against them. *Erickson v. Quinn*, 15 Abb. (N. S.) 166, Court of Appeals, 1872, citing *Chautauque County Bank v. White*, 6 N. Y. 236. It is said in *Bergen v. Carman*, 79 N. Y. 153, that it is well settled that where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment-creditor may proceed to sell under his execution, and the purchaser will have the right to impeach the conveyance in an action at law to recover the premises. He may, but he is not bound to file a bill to set aside the conveyance, and the cases of *Lamont v. Cheshire*, 65 N. Y. 30, and *Bockes v. Lansing*, 74 N. Y. 437, are said not to be in conflict with that position; the latter case holds that it is only where an instrument on its face purports

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to convey title paramount to that of the party seeking relief that an action will lie to set aside such instrument.

The Court of Chancery has power, under a bill filed by a judgment-creditor for the purpose of setting aside a fraudulent conveyance of the debtor's land, to direct a conveyance and order the lands sold by a receiver. The provisions of the Revised Statutes apply only to creditor's bills, so called, where the only claim is relief, that the remedy at law is exhausted, and they leave untouched the equity powers of the Court of Chancery in reference to fraudulent conveyances. *Chautauqua County Bank v. White*, 6 N. Y. 236; S. C. 19 N. Y. 369.

But in *Adsit v. Butler*, 87 N. Y. 585, it is held that even in such a case, in accordance with the uniform practice of the Court of Chancery, the plaintiff must establish that an execution has been issued on the judgment and returned unsatisfied, or that it is still outstanding. There are two sorts of creditor's bills known to our jurisdiction, the one the statutory bill in aid of the creditor who has exhausted his remedy at law, the other not depending upon the statute, brought for the administration of assets to reach property fraudulently disposed of, held in trust, etc. *Conro v. Port Henry Iron Co.* 12 Barb. 58.

It is a very familiar head of equity jurisdiction to set aside, at the suit of the judgment-creditor, conveyances by the debtor, which have been interposed to defraud such creditor, and which, if allowed to stand, would embarrass his remedy. *Hendricks v. Robinson*, 2 Johns. Ch. 283; *McCullough v. Colby*, 5 Bosw. 477; *North Am. Fire Ins. Co. v. Graham*, 5 Sandf. 197; *Edmeston v. Hyde*, 1 Paige, 637. A judgment-creditor, having no title or specific lien, may maintain an action to compel the cancellation of prior judgments, which are apparent liens upon the lands of his debtor, but which he alleges to have been paid, and this without alleging any collusion on the part of the debtor to keep the judgments on foot to defraud his creditors. It is unnecessary to maintain such an action that the creditor should have issued execution to the county in which the lands lie. It is sufficient that an execution has been returned unsatisfied in the county where the debtor resides, and that his judgment is a lien on the land. *Shaw v. Dwight*, 27 N. Y. 244. It was held in *Gleason v. Gage*, 7 Paige, 121, citing *Hadden v. Spader*, 20 Johns. 554, that the creditor, after the remedy against the tangible property of the

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debtor had been exhausted by the return of an execution unsatisfied, might come into chancery for the purpose of obtaining a discovery and payment out of the property of the debtor, which could not otherwise be reached, and that it was the duty of the court to extend the remedy to every case coming within the spirit and intent of the statutory provision. A creditor seeking aid as to real property must have a judgment at the time of filing the bill. *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Brinkerhoff v. Brown*, 4 Johns. Ch. 671; *Williams v. Brown*, 4 Johns Ch. 682; *Moran v. Dawes*, Hopk. Ch. 365; *Lawton v. Levy*, 2 Edw. 197. There must be fraud in a conveyance to authorize a bill in aid of an execution. *McCaffrey v. Hickey*, 66 Barb. 489.

A creditor may maintain an action without an execution against an administrator of a judgment-debtor to set aside a fraudulent conveyance, but he obtains no preference. *Everingham v. Vanderbilt*, 12 Hun, 75; *Malloy v. Vanderbilt*, 4 Abb. N. C. 127. A creditor need not show an execution returned unsatisfied in an action to remove an obstruction to an execution, but he must show the necessity for asking the aid of a court of equity. *Payne v. Sheldon*, 63 Barb. 169. One who has issued execution may maintain suit to set aside an assignment of real and personal property. *Parshall v. Tillou*, 13 How. 7; *Bishop v. Halsey*, 3 Abb. 400. It is only after the creditor has exhausted all the means in his power at law that he is entitled to invoke the aid of a court of equity to discover and apply the debtor's property to his claim. In cases of pure trust, however, the parties may resort, in the first instance, to a court of equity. *Sloane v. Waring*, 9 Week. Dig. 117.

Where a chattel mortgage clause, in a lease which is void because not filed, is used as an obstruction to an execution, the creditor may maintain an action against the parties to such lease to remove the obstruction in aid of his execution. To entitle a party to the aid of the court, in removing a fraudulent obstruction to an execution, the plaintiff must show a lien on the property by his judgment. *McElwain v. Willis*, 9 Wend. 548; *Parshall v. Tillou*, 13 How. 7; *Crippen v. Hudson*, 13 N. Y. 161; *Reubens v. Foel*, 13 N. Y. 488. This remedy cannot be had by a simple contract creditor. *Bownes v. Weld*, 3 Daly, 253; *Bayarid v. Fellows*, 28 Barb. 451; *Cropsey v. McKinley*, 30 Barb. 47; *Dunlevy v. Tallmadge*, 32 N. Y. 457. To establish a judgment-debtor's lien on

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real estate of the debtor, no execution is necessary. *Royer Wheel Co. v. Fielding*, 61 How. 437. This seems to have been reversed. See 31 Hun, 274, 101 N. Y. 504. See, also, opinion in *Lichtenberg v. Herdtfelder*, 67 How. 198. A creditor who by docketing a lien has obtained a lien which gives him a right to enforce his judgment against the property on which the lien exists, may pursue his remedy under such lien, if he have an outstanding execution, to remove obstacles and the enforcement of his execution. *Adsit v. Butler*, 87 N. Y. 585; *Sullivan v. Miller*, 106 N. Y. 636. A creditor's action, to set aside a conveyance as fraudulent, is not maintainable upon proof merely that such conveyance was made without consideration, and while the indebtedness to plaintiff existed, but the fraudulent intent must be established, as matter of fact, either directly or by necessary inference. *Emmerich v. Hefferan*, 53 Super. Ct. 98, citing *Cole v. Tyler*, 65 N. Y. 73; *Fox v. Moyer*, 54 N. Y. 125. To entitle the plaintiff to maintain the action, it is essential he should show himself a judgment-creditor, and that the conveyances challenged as fraudulent were so in fact and stood in the way of his judgment. The production of a judgment is conclusive evidence of the plaintiff's character as a creditor. *Carpenter v. Osborn*, 102 N. Y. 552. As to the right of an attaching creditor, see *Bates v. Plonsky*, 28 Hun, 112.

Upon a review of all the authorities on the subject, Bishop, in his work on insolvent debtors, deduces the following principle at page 330: "It will be observed, therefore, that the remedy of judgment-debtors in equity is three-fold: First, as against leviable assets he may maintain an action in aid of the execution; second, he may maintain an action under the Code for discovery and for the satisfaction of his judgment out of the property of the judgment-debtor so discovered or reached; third, he may proceed as in a creditor's action under the inherent powers of a court of equity." It must be added, however, that as to the third remedy above named, it is exceedingly dangerous to proceed until after execution is returned unsatisfied unless a case arises where it is impossible to procure the return of an execution unsatisfied, or one which falls within the rules laid down in some one of the reported decisions of the courts. This more particularly in view of the rule laid down in *National Tradesmen's Bank v. Wetmore*, 124 N. Y., at page 241, where it is said: "It has become a settled law in this State not to dispense with those pre-

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liminary proceedings at law, although it may be made to appear by evidence that no benefit could result to the creditor therefrom." See, also, *Frothingham v. Hodenpyl*, 135 N. Y. 630.

Among the apparent exceptions to the rule requiring the return of an execution unsatisfied are those contained in chapter 314, Laws of 1858, amended chapter 487, Laws 1889, authorizing an executor, administrator, receiver, assignee or other trustee to disaffirm any transfer or agreement made in fraud of the rights of a creditor. *Bostwick v. Menck*, 40 N. Y. 383; *Metcalf v. Del Valle*, 64 Hun, 245. Under *Southard v. Benner*, 72 N. Y. 424, the same rule seems to be applicable to an assignee in bankruptcy. See, also, *Bate v. Graham*, 11 N. Y. 237; *Swift v. Hart*, 35 Hun, 128; *Lowery v. Clinton*, 32 Hun, 267; *Harvey v. McDonnell*, 113 N. Y. 526; *Spellman v. Freedman*, 130 N. Y. 421.

Where the suffering of judgment by an insolvent corporation and the transfer of property by it to one who holds the same for the judgment-creditor are merely parts of a single scheme to prefer the creditor, an action may be maintained against all parties who participated in the transaction and received anything under it. *Wood v. Sidney Sash, Blind & Furniture Co.* 92 Hun, 22, 37 N. Y. Supp. 885, 72 St. Rep. 830.

Where a wife has permitted her husband to take title to her real estate, her equitable title cannot prevail as against creditors of the husband. *Sloan v. Huntington*, 8 App. Div. 93. A purchaser for value is not chargeable with constructive notice that a conveyance to him was made with intent to defraud creditors; actual notice is required to impair or affect his title. *King v. Holland Trust Co.* 8 App. Div. 112. An action to set aside a deed as fraudulent as to creditors, cannot be maintained where such deed was not delivered during the grantor's lifetime but was surreptitiously and fraudulently obtained after his death, by the grantee or her husband, and the complaint in an action by an executor to set aside a deed made by his testator as fraudulent as to his creditors, should show the existent of such debts as would render the conveyance fraudulent at the time it was made. An action under §§ 1638 and 1639 cannot be maintained where the property is in the hands of a receiver appointed by the court. *Walker v. Pease*, 17 Misc. 415.

A creditor's action may be maintained to have a chattel mortgage declared void for delay in filing and to reach the property or

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its value, where it has been taken by the mortgagee. *Webb v. Staves*, 1 App. Div. 145, 37 N. Y. Supp. 414, 72 St. Rep. 711.

A transfer by an insolvent debtor of all his property at its full value to a single creditor in payment of his debt, where no general assignment is made or contemplated, is not within the statute prohibiting preferences in general assignments in excess of one-third of the assigned estate. *Tompkins v. Hunter*, 149 N. Y. 117, 43 N. E. Rep. 532.

SUB. 2. ACTION UNDER CODE PROVISIONS. §§ 1871, 1872.

§ 1871. When judgment-creditor may bring action.

When an execution against the property of a judgment-debtor, issued out of a court of record, as prescribed in the next section, has been returned wholly or partly unsatisfied, the judgment-creditor may maintain an action against the judgment-debtor, and any other person, to compel the discovery of any thing in action, or other property belonging to the judgment-debtor, and of any money, thing in action, or other property due to him, or held in trust for him ; to prevent the transfer thereof, or the payment or delivery thereof, to him, or to any other person ; and to procure satisfaction of the plaintiff's demand, as prescribed in the next section but one. Where the execution was issued as prescribed in section 1934 of this act, and a defendant not summoned in the original action is made a defendant in an action brought under this section, personal property, owned by him jointly with the defendants summoned or with any of them, may be applied to the satisfaction of the plaintiff's demand as prescribed in this article.

§ 1872. To what county execution must have issued.

To entitle the judgment-creditor to maintain an action as prescribed in the last section, the execution must have been issued as follows :

1. If, at the time of the commencement of the action, the judgment-debtor is a resident of the state, to the sheriff of the county where he resides.
2. If he is not then a resident of the state, to the sheriff of the county where he has an office for the regular transaction of business in person ; or if he has no such office within the state, to the sheriff of the county where the judgment-roll is filed, unless the execution was issued out of a court other than the court in which the judgment was rendered ; in which case it must have been issued to the sheriff of the county where a transcript of the judgment is filed.

The action cannot be maintained against a corporation. § 1879, article II.

Where a plaintiff has issued execution upon his judgment and levy has been made on property of the judgment-debtor, which is claimed to have been fraudulently assigned by him, the creditor may bring an action in aid of the execution to enforce its lien and remove the obstruction to the legal remedy occasioned by the fraudulent act of the debtor. *Chautauqua County Bank v. White*,

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6 N. Y. 236; *Frost v. Mott*, 34 N. Y. 253; *Shaw v. Dwight*, 27 N. Y. 244; *Crippen v. Hudson*, 13 N. Y. 161; *McAuley v. Smith*, 132 N. Y. 524. See upon this point *Royer Wheel Co. v. Fielding*, 31 Hun, 274, reversed upon other grounds, 101 N. Y. 504.

The general equity powers of the court in creditor's actions are not limited by the provisions of §§ 1871 and 1872. *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241. Although this rule is perhaps limited when choses in action are sought to be reached by creditor's bill. *Del Valle v. Hyland*, 40 St. Rep. 924; *Fox v. Moyer*, 54 N. Y. 125; *Shaw v. Dwight*, 27 N. Y. 244. And as to whether the rule is not also limited in case it is sought to reach real estate, see same cases, also, *Crippen v. Hudson*, 13 N. Y. 161; *Haswell v. Links*, 87 N. Y. 637, and *Adsit v. Butler*, 87 N. Y. 585.

The rule requiring issue and return of an execution as condition precedent to the maintenance of a creditor's action, is not of universal application, and does not deny to a party the interposition of the equity powers of the court when the situation is such as to render impossible the aid of a court of law to their taking the preliminary steps to produce what ordinarily may be treated as a condition precedent to the application for equitable relief. *Le-fevre v. Phillips*, 81 Hun, 232.

It seems that the provisions of the Code, in reference to attaching creditor's action and creditor's bills do not extend so far as to deny to a creditor the interposition of the equity powers of the court where the statute is such as to render it impossible for him to obtain relief under this provision, but such equity powers will not be extended to cases where parties may, by compliance with the Code, obtain full relief and protection. Ordinarily an action in the nature of a creditor's bill can be maintained only after the entry of judgment and the return unsatisfied of an execution issued thereon, but cases have arisen in which it was impossible for parties to comply with this provision, in which it has been found necessary, in order to protect the rights of creditors, for the court to interfere through its equity powers. *Whitney v. Davis*, 88 Hun, 168.

A simple contract creditor cannot maintain an action to set aside as fraudulent a conveyance made by his debtor, and where more than ten years have elapsed since the docketing of the judgment, a new lien upon the land must have been acquired, by the levy

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of an execution thereon, to enable a judgment-creditor to maintain the action. *Evans v. Hill*, 14 Hun, 464. The debt must be ascertained by judgment, even though the debtor died insolvent. *Barnett v. Gould*, 27 Hun, 366; *Allen v. Thurston*, 53 N. Y. 622; *Estes v. Wilcox*, 67 N. Y. 264. A creditor cannot have a transfer set aside as fraudulent unless he has a judgment. *Bishop v. Halsey*, 3 Abb. 400; *Cropsey v. McKinney*, 30 Barb. 47; *Schnitzer v. Cohen*, 7 Hun, 665; *Reubens v. Joel*, 13 N. Y. 488; *N. Y. Ice Co. v. N. W. Ins. Co.* 23 N. Y. 357; *Dunlavy v. Tallmadge*, 32 N. Y. 457; *Conner v. Webber*, 5 Week. Dig. 457. A creditor cannot attack a transfer as fraudulent until he has recovered a judgment and issued execution. *Geery v. Geery*, 63 N. Y. 252; *Lichtenberg v. Hertfelter*, 5 Civ. Pro. R. 426; *Adsit v. Butler*, 87 N. Y. 585.

If there is no judgment, the bill to set aside a fraudulent conveyance cannot be maintained. *Bank of Rochester v. Emerson*, 10 Paige, 115. But it is not necessary that the judgment should exist prior to the alleged fraudulent transfer. *National Bank of Rondout v. Dreyfus*, 14 Week. Dig. 160. But the necessity for docketing cannot be dispensed with by an averment that the defendant has no real estate. *Youngs v. Morrison*, 10 Paige, 325. An action in the nature of a creditor's suit cannot be maintained by a creditor of an extinct corporation, to reach funds of the corporation, without a valid judgment and execution, or without first exhausting his remedy against the corporation. *Sturges v. Vanderbilt*, 73 N. Y. 384. But if a corporation has been dissolved, creditors may sue a stockholder without a judgment against the corporation. *Hetzel v. Tannehill Ins. Co.* 4 Abb. N. C. 40.

In order to authorize a creditor of a firm to maintain an action against it, to recover money or choses in action transferred by him to the firm, a judgment must first have been obtained against the firm, and execution returned unsatisfied. *Bell v. Merrifield*, 28 Hun, 219. Any creditor of an insolvent limited partnership may, without judgment or execution, maintain an action to restrain the partners from disposing of the property contrary to law and for a receiver. *Whitcomb v. Fowler*, 7 Abb. N. C. 295. A firm creditor with a judgment against one partner, on a guaranty of the firm debt, cannot maintain a creditor's suit till he has a judgment against the other partner. *Lewisohn v. Drew*, 15 Hun, 467. A creditor, by attaching property in the

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debtor's possession, acquires such a specific lien that he is entitled, like a judgment-creditor, to impeach the corporate title of a fraudulent mortgagee. *Frost v. Mott*, 34 N. Y. 253. See § 677 as to right of an attaching creditor to bring the action.

It was held, under the former Code, that where plaintiff attached a bond and mortgage, which he alleged the debtor had fraudulently assigned, and sued to set aside the assignment, that the action would not lie; the rule that a judgment-creditor only could maintain the suit was applied. *Thurber v. Blanck*, 50 N. Y. 80. See, upon this point, *Greenleaf v. Munford*, 30 How. 30; *Heye v. Bolles*, 33 How. 266; *Mechanics and Traders' Bank v. Dakin*, 33 How. 316; *Rinehey v. Stryker*, 28 N. Y. 45, and compare §§ 677 to 680. The statute does not authorize a bill to be filed on a judgment in a United States court. *Tarbell v. Griggs*, 3 Paige. 207; *Davis v. Bruns*, 23 Hun, 648. A creditor by simple contract is within the protection of the statute of frauds, declaring every conveyance or transfer of chattels, not followed by actual and continued change of possession, presumptively fraudulent as against the creditors of the vendor or assignor, but until he has a judgment or a lien, or a right to a lien, he is not in a condition to assert his rights as a creditor. The act of 1858, chapter 314, however, which authorizes an assignee, or other trustees of an estate of an insolvent, to bring an action for the benefit of creditors and others interested, to disaffirm and treat as void all transactions in fraud of their rights, and to maintain all necessary actions for that purpose, dispenses with the necessity of any special or other lien in behalf of individual creditors, and an action by such trustee, to annul a fraudulent transfer, and to recover the property or its avails, may be brought for the benefit of simple contract creditors. *Southard v. Benner*, 72 N. Y. 424, citing *Geery v. Geery*, 63 N. Y. 256.

The return of an execution unsatisfied is essential to give the court jurisdiction, or the action must be brought in aid of an execution outstanding. *Adsit v. Butler*, 87 N. Y. 585. That an execution must be returned unsatisfied in order to maintain the action is held in *Ester v. Wilcox*, 67 N. Y. 264; *Allyn v. Thurston*, 53 N. Y. 622; *Geery v. Geery*, 63 N. Y. 252; *Crippen v. Hudson*, 13 N. Y. 161; *Voorhees v. Howard*, 4 Abb. Ct. App. Dec. 504; *Beardsley v. Foster*, 36 N. Y. 561; *Forbes v. Woller*, 25 N. Y. 434; *Sullivan v. Miller*, 106 N. Y. 636; *Lichtenburgh v. Hert-*

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felder, 103 N. Y. 302; *National, etc. v. Wetmore*, 42 Hun, 359; *Andrew v. Vanderbilt*, 37 Hun, 468; *Bowe v. Arnold*, 18 Week. Dig. 326; *Gardner v. Lansing*, 28 Hun, 415; *Genesee River, etc. v. Mead*, 18 Hun, 303; *Kerr v. Dillderie*, 26 Week. Dig. 70; *Jacobstein v. Abrams*, 41 Hun, 272; *Briggs v. Van Buren*, 19 Week. Dig. 216; *Albany City, etc. v. Gaynor*, 67 How. 421; *Taylor v. Bowker*, 111 U. S. 115. The fact that the debtor is an insolvent corporation, and has conveyed its property against the statute, does not authorize a resort to equity until the remedy at law is exhausted. *Adce v. Bilger*, 81 N. Y. 349. An action based upon a judgment rendered against executors in their representative capacity is not maintainable to set aside a conveyance of real estate, made by the deceased, as fraudulent as against creditors.

The judgment is not a lien upon the land, and so it may not be sold under any execution issued thereon. The conveyance, therefore, is no obstruction to any lien the judgment-creditor has, or to the enforcement of any execution issued on his judgment. Plaintiff must exhaust his remedy before he can maintain this action. *Viale v. Dater*, 13 Week. Dig. 54; *Myer v. Mohr*, 19 Abb. 299; *Parshall v. Tillou*, 13 How. 7; *Herring v. N. Y., Lake Eric, etc. R. R. Co.* 63 How. 497. One of two execution creditors, who were severally liable, paid the sheriff, who returned the execution satisfied as to him, and *nulla bona* as to the other; *held*, such return was insufficient as the foundation for a creditor's bill, by the defendant making the payment and taking an assignment of the judgment from the plaintiff. *Bostwick v. Scott*, 40 Hun, 212.

An indorsement by a deputy sheriff, more than sixty days after issue of an execution of *nulla bona* and delivery by him to an officer in charge of the sheriff's office to have filed, is a sufficient return to sustain a creditor's suit begun on that day though the return be not filed with the county clerk till the next day. *Iselin v. Henlein*, 16 Abb. N. C. 73. It is not essential to an action by a judgment-creditor to set aside a fraudulent transfer by his debtor, that an execution should be outstanding at the time the creditor's suit is brought, but it is enough if execution has been returned unsatisfied. *Haswell v. Lincks*, 87 N. Y. 637. It is not only necessary that an execution should be returned unsatisfied, but the complaint must allege that fact. *Adsit v. Butler*, 87 N. Y. 585, and cases cited. It should also show that execution

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was issued to the county where defendant resided. *Campbell v. Foster*, 16 How. 275; *Simmons v. Eldridge*, 29 How. 309; *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561. Allegations to show that an execution would be useless are not sufficient. *McEkvain v. Willis*, 9 Wend. 548. Where the execution was against the real property, which defendant had, at a day later than the docketing of the judgment, *held*, that the bill must be dismissed as the remedy at law was not exhausted. *Manning v. Merritt*, Clarke, 98. If the execution is returned after an attempt, in good faith, to collect, the action may be commenced before the expiration of sixty days from the date of its issue. *Knauth v. Bassett*, 34 Barb. 31; *Billhofer v. Henbach*, 15 Abb. 143; *Field v. Hunt*, 24 How. 463; *Forbes v. Waller*, 25 N. Y. 430; *Renaud v. O'Brien*, 35 N. Y. 99. In *Murtha v. Curley*, 90 N. Y. 372, where execution was returned the same day that the summons was dated, *held*, that a finding that the execution was returned before the commencement of the action was justified; execution issued after suit brought is insufficient. *McCullough v. Colby*, 5 Bosw. 477. As to proper county to which to issue execution against a corporation, see *Maher v. Carman*, 38 N. Y. 26. The action cannot be maintained unless execution has been issued to the proper county. *Genesee River Nat. Bank v. Mead*, 18 Hun, 303. Execution against all of several joint debtors, parties to an action, is sufficient foundation for a creditor's suit, notwithstanding a formal irregularity in docketing the judgment only against those served. *Produce Bank v. Morton*, 67 N. Y. 199. A judgment-creditor of a firm may maintain an action against one member thereof to set aside a fraudulent conveyance, although he has not exhausted his remedy against the other party. *Tuthill v. Goss*, 89 Hun, 609, 35 Supp. 136, 69 St. Rep. 454. Where a creditor sues two joint debtors and recovers judgment against one, he is not obliged to prosecute the suit to judgment against the other before bringing a creditor's action; but he may do so at once upon the issue and return unsatisfied of an execution against the judgment-debtor. *Hiler v. Hetterick*, 5 Daly, 33. But it is held in *Child v. Brace*, 4 Paige, 309, that if there are several defendants jointly liable, the remedy by execution must have been exhausted against all; and it is held in *Field v. Chapman*, 15 Abb. 434; *Field v. Hunt*, 24 How. 463; *Dunlevy v. Tallmadge*, 32 N. Y. 457, that the execution must have been against the property of all the judgment-

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debtors and the remedy thereon pursued to every available extent; and if some only have been served, the creditor's action will lie only as to them. See, however, § 1871. Before the assets of a firm can be reached by a creditor's bill the remedy at law must be exhausted, not only by judgment and execution against one of the firm individually, but against all the copartners and their assets. *Levishon v. Drew*, 15 Hun, 467. It is said in *Austin v. Figuera*, 7 Paige, 56, and *Wichester v. Crandall*, Clarke, 371, that the usual return against joint debtors, one of whom has not been served with process, is sufficient. It is enough to sustain the bill that the execution is returned unsatisfied, in part. *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561. A justice's execution does not exhaust the remedy at law. *Dix v. Briggs*, 9 Paige, 595; *Crippen v. Hudson*, 13 N. Y. 161; *Henderson v. Brooks*, 3 T. & C. 445. Query, whether the action can be maintained where the execution is returned to the wrong clerk. *Winslow v. Pitkin*, 1 Barb. Ch. 402; *Clark v. Dakin*, 2 Barb. Ch. 36. It is said in *Gillett v. Staples*, 16 Hun, 587, that the existence of a remedy by execution is not a bar to a creditor's bill, when it is claimed the property belonged to others. The rule that the legal remedy must be exhausted was applied denying application for an injunction in creditor's suit. *Kerr v. Dildinc*, 6 St. Rep. 163. In an action by a receiver, in supplementary proceedings, to reach assets of a judgment-debtor, it is not necessary to show execution issued to the county where the judgment-debtor resides. *Hyatt v. Dusenbury*, 12 Civ. Pro. R. 132. Proceedings supplementary to execution are not a necessary preliminary to a judgment-creditor's action. *Pope v. Colc*, 55 N. Y. 124. The provision requiring judgment and execution is not changed by § 713. *Adce v. Bigler*, 81 N. Y. 349.

While the recovery of a judgment and the return of an execution issued thereon unsatisfied are essential prerequisites to the maintenance of an action in the nature of a creditor's bill under the statute, and while, as a general thing, the same rule is applied to actions in equity, having in their purpose or the relief sought the nature of statutory creditor's bills, it does not extend so far as to deny to a creditor the interposition of the equity powers of the court, where the situation is such as to render it impossible for him to take those preliminary steps. *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241, 35 St. Rep. 316. It is further held

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in that case that when a party has done all that it is possible for him to do to prepare the way for his case to equitable cognizance he is not to be denied access to the only tribunal capable of granting relief merely because he had proceeded no further than he was, without any fault or laches on his part, permitted to go, citing *Shellington v. Howland*, 53 N. Y. 371; *Kincaid v. Drwinelle*, 59 N. Y. 548; *Harvey v. McDonnell*, 113 N. Y. 526.

In *Prentiss v. Bowden*, 145 N. Y. 342, 40 N. E. Rep. 13, 64 St. Rep. 811, 24 Civ. Pro. R. 295, affirming 8 Misc. 420, 60 St. Rep. 444, 28 Supp. 666, it was held that in order to sustain an action by a judgment-creditor in his own behalf to set aside the conveyance of land made by his debtor on the ground that it was made in fraud of creditors, plaintiff must show that he has exhausted his remedy at law against the debtor by the issue and return of an execution unsatisfied, in whole or in part. An execution issued after the death of the debtor without notice to his representatives or permission of the surrogate, will not meet the requirement, as such an execution is prohibited by § 1379, Code of Procedure, and is absolutely void. It seems such an action may be maintained by the judgment-creditor on behalf of all of the creditors without the issuing and return of an execution upon refusal of the representatives of the deceased debtor to bring it, distinguishing 124 N. Y. 241, *supra*.

Cases in which a creditor may proceed by action to set aside fraudulent dispositions made by the debtor of his property are, first, after the return of an execution unsatisfied, in whole or in part, in which action a receiver may be appointed to whom the party holding the debtor's property may be compelled to deliver it over or assign it; second, after the issue of an execution, an action may be maintained by a judgment-creditor to remove obstructions and set aside fraudulent dispositions of the debtor's property preventing the execution from being made effectual. *Bowe v. Arnold*, 31 Hun, 256.

An equitable action analogous to a creditor's suit may properly be brought in aid of and to enforce the lien of an attachment before the recovery of judgment in the attachment suit, when the debtor's property has been fraudulently transferred and there is danger of its removal from the jurisdiction. The attaching creditor, after service of his warrant, is no longer to be deemed a creditor at large, but a creditor for a specific lien. For the purpose of up-

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holding it, the decision of the judge granting the attachment is to be deemed an adjudication of the existence of the debt which is conclusive upon the fraudulent transferee. In order to authorize the action, however, it seems that there must be danger of removal of the attached property from the jurisdiction of the officer having it in custody. *Kauffman v. Van Buren*, 136 N. Y. 252. *Thurber v. Blanck*, 50 N. Y. 80, is distinguished upon the ground that the court was there dealing with an attempt on the part of an attaching creditor to reach equitable assets which it has been uniformly held cannot be done until judgment has been recovered, execution issued and returned unsatisfied and an action in the nature of a creditor's bill instituted.

It is well settled that a simple contract creditor cannot attack as fraudulent the transfer by his debtor of property applicable to the payment of the debt until after the recovery of judgment, the issue and levy of an execution or its return unsatisfied. *Spelman v. Freedman*, 130 N. Y. 421, 42 St. Rep. 531.

A judgment-creditor, by the commencement of an action to discover property belonging to the debtor, secures a lien upon all of the property of the debtor acquired before the commencement of the action. *Green v. Griswold*, 15 Civ. Pro. R. 220.

It is no defence to a judgment-creditor's action that the debtor has property out of which the judgment could be collected; and if an execution has been issued and returned unsatisfied, the debtor cannot avail himself of that fact as a defence to the creditor's action, but has his remedy against the sheriff. *Bank of Montreal v. Gleason*, 14 Civ. Pro. R. 377.

Since a judgment obtained by service by publication upon a non-resident can, under § 707, be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time the judgment is entered, a creditor's bill will not lie upon such a judgment, since an execution as required under § 1871, as a condition precedent to the right to maintain the action, could not be issued. *Capital City Bank v. Parent*, 20 Civ. Pro. R. 38, 34 St. Rep. 826, 12 Supp. 234. A doubt is expressed whether *McCartney v. Bostwick*, 32 N. Y. 53, is now law, citing *Ocean National Bank v. Olcott*, 46 N. Y. 12; *Cartwright v. Maplesden*, 53 N. Y. 622; *Estes v. Wilcox*, 67 N. Y. 264.

The rule that an action cannot be maintained against a judg-

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ment-creditor not served with process, is also well held. *Galle v. Todd*, 21 Civ. Pro. R. 152, distinguishing *Bates v. Plonsky*, 2 Civ. Pro. R. 389.

The rule that a judgment-creditor seeking to reach personal property which has been conveyed by the debtor must commence his action while the execution is in the hands of the sheriff, does not apply where the property sought to be subjected is a chose in action, under § 1871, which provides that the judgment-creditor can maintain an action for an execution returned unsatisfied to prevent the transfer of the thing in action by the judgment-debtor, or to compel a discovery in respect thereof and procure satisfaction of his demand out of the same. *Delvalle v. Hyland*, 15 Supp. 901, 40 St. Rep. 924.

A creditor's bill lies to obtain discovery from debtors of certain book accounts concealed, withheld and transferred in fraud of creditors, although the same relief may be obtained by supplementary proceedings. *Hart v. Albright*, 18 Supp. 718.

An action by a judgment-creditor to set aside a general assignment of personal property for benefit of creditors as fraudulent, and reach assets fraudulently appropriated, will lie, although execution has been returned unsatisfied. *Wilcox v. Payne*, 22 Abb. N. C. 307, 28 St. Rep. 712. In *Bell v. Merrifield*, 14 Civ. Pro. R. 146, it was held that as no point was made with regard to the proof of the regularity of the issuing and return of the execution in an action of this character at the trial, it could not be raised on the appeal. A levy under an execution, after the death of a judgment-debtor, is not sufficient to sustain a creditor's suit on return of the execution unsatisfied. *Prentiss v. Bowden*, 8 Misc. 420, 60 St. Rep. 444, 28 Supp. 666, affirmed, 145 N. Y. 342, 40 N. E. Rep. 13, 64 St. Rep. 811. The statute of limitations does not begin to run against the right of such creditor until a recovery of the judgment in this State and return of execution unsatisfied. *Weaver v. Haviland*, 142 N. Y. 534, 37 N. E. Rep. 641, 60 St. Rep. 73. Where it appears that the judgment was not indexed against a debtor, who has since died, so as not to become a lien upon his real estate, no execution can be issued thereon, and by the issuing and return of execution, is no condition precedent upon the granting of a creditor's action. *Lefever v. Phillips*, 81 Hun, 232, 62 St. Rep. 663, 30 N. Y. Supp. 709. A creditor's action will not lie to set aside an assignment for benefit of credi-

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tors of securities given immediately subsequent, upon evidence that there was a scheme to secure a preference in excess of the one-third of net assets allowed by law. In case of an unlawful preference, the rights of creditors can only be asserted by an assignee, or by an action in aid of the assignment for the benefit of all the creditors. *Central National Bank v. Seligman*, 138 N. Y. 435.

In *Abegg v. Bishop*, 142 N. Y. 286, it was held that an action is not maintainable to set aside a transfer or an assignment, because of the unlawful preferences, but it seems the only remedy is an action in aid of the assignment, and for the benefit of all the creditors, to subject the excess to the claims of creditors under that instrument.

Where the rights of creditors under general assignment of the debtor's property are not protected by the assignee, the remedy of creditors aggrieved is by an action in aid of the assignment for the benefit of the body of creditors; the party bringing the action obtains no preference. *Maas v. Fack*, 146 N. Y. 34. A general creditor cannot maintain an action to avoid judgment against his debtor, as such right is given only when the claim of the creditor is established by a judgment and execution returned unsatisfied. *Frothingham v. Hodenpyl*, 135 N. Y. 630, 48 St. Rep. 449. Where a creditor has recovered a judgment in another State, his right to sue to set aside a debt in this State does not accrue until a recovery of judgment here. *Weaver v. Haviland*, 68 Hun, 376, 52 St. Rep. 311, 22 Supp. 1012.

Where administrators, on application of a creditor of their intestate, refuse to exercise the power conferred on them by § 1, chapter 314, Laws 1858, to disaffirm the transfer made by said intestate to one of the administrators in fraud of the rights of creditors, and to reclaim the property fraudulently conveyed, and where the estate in the hands of the administrators is insufficient to pay the debts, a creditor may bring an action for his own benefit and that of all other creditors to reclaim the property, making all the administrators parties. It is not essential that the plaintiff in such an action should be a judgment-creditor. He stands simply as trustee in place of the administrators. *Harvey v. McDonnell*, 113 N. Y. 526, reversing same case, 48 Hun, 409, and distinguishing *Lichtenburg v. Herdtfelder*, 103 N. Y. 302; *National Tradesmen's Bank v. Wetmore*, 124 N. Y. 241; *Nat. Bank of West Troy v. Levy*, 127 N. Y. 549.

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A simple contract creditor cannot sustain an action to set aside an alleged fraudulent conveyance. *Viall v. Dater*, 13 Week. Dig. 54; *Schuitzer v. Cohen*, 7 Hun, 665; *Evans v. Hill*, 18 Hun, 464. A complaint to set aside a fraudulent conveyance must allege that the creditor has recovered a judgment and exhausted all legal remedies. It is not sufficient to show that the debtor is a non-resident and has no property within the State; *Ballou v. Jones*, 13 Hun, 629; nor is it enough that defendant is keeping himself concealed out of the State to avoid service. *Sloan v. Waring*, 55 How. 62. An action brought by a creditor before judgment to reach the equitable assets of his debtor, in case where his insolvency has been shown, cannot be maintained. *Briggs v. Oliver*, 68 N. Y. 336. A plaintiff who is a judgment-creditor of a single partner, and also of the firm of which he is a member, may bring an action to set aside an assignment and collect both judgments. *Genesee Co. Bank v. Bank of Batavia*, 43 Hun, 295. There must be a judgment in all cases to enable a party to maintain a creditor's bill. This grows out of a statutory requirement, but the same rule applies in all cases where such relief is demanded, independent of statutory provision, and it is not sufficient to proceed by all other means against the estate of a decedent, and the remedy at law is not exhausted thereby and plaintiff, in such case, has no standing to demand relief. *National Bank v. Wetmore*, 42 Hun, 359. The rule which precludes a court of equity from entertaining jurisdiction of an action to set aside a fraudulent conveyance at the suit of a contract creditor renders a judgment erroneous so far as it declares such a debt a lien upon the property. *Carpenter v. Osborn*, 102 N. Y. 552. A judgment obtained against the personal representatives of the deceased is not a lien on the land, and an action cannot be maintained on it to set aside a fraudulent conveyance. *Lichtenburgh v. Herdtfelder*, 103 N. Y. 302.

SUB. 3. ACTION IN NATURE OF CREDITOR'S BILL BY EXECUTORS AND OTHERS.

Section 1 of chapter 314, Laws of 1858, as amended by chapter 740, Laws of 1894, reads as follows:

§ 1. Trustees, etc., may impeach assignments.

That any executor, administrator, receiver, assignee, or trustee of an estate, or the property and effects of an insolvent estate, corporation, association, partnership or individual, may for the benefit of creditors or others interested in the

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estate or property so held in trust, disaffirm, treat as void, and resist all acts done, transfers, and agreements made, in fraud of the rights of any creditor, including themselves and others, interested in any estate or property, held by or of the right belonging to any such trustee or estate. And any creditor of a deceased insolvent debtor, having a claim or demand against the estate of such deceased debtor exceeding in amount the sum of one hundred dollars, may, in like manner, for the benefit of himself and other creditors interested in the estate or property of such deceased debtor, disaffirm, treat as void, and resist all acts done, and conveyances, transfers and agreements made, in fraud of the right of any creditor or creditors by such deceased debtor, and for that purpose may maintain any necessary action to set aside such acts, conveyances, transfers or agreements; and for the purpose of maintaining such action, it shall not be necessary for such creditor to have obtained a judgment upon his claim or demand, but such claim or demand, if disputed, may be proved and established upon the trial of such action. And the judgment may provide for the sale of the premises or property, when any conveyance or transfer of the same is set aside, and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law.

The act of 1858 authorized a new class of actions analogous to creditors' bills to be brought for the benefit of all creditors alike, by the assignee or other representative of the insolvent estate, to set aside fraudulent transfers by the debtor. *Reynolds v. Ellis*, 103 N. Y. 116; *Southard v. Benner*, 72 N. Y. 424; *Spelman v. Freedman*, 130 N. Y. 427, holding, further, that it is abundantly established that the creditors in such case may commence an action to reach the property (fraudulently transferred), making the assignee, the debtor and his transferees parties defendant, citing *Dewey v. Moyer*, 72 N. Y. 70. And if the assignee refuses in a proper case to act, the creditors collectively, or one in behalf of all who may come in, may compel the execution of the trust. *Crounse v. Frothingham*, 97 N. Y. 105. It is not essential that the plaintiff in such an action should be a judgment-creditor; he stands simply as trustee in place of administrators. *Harvey v. McDonald*, 113 N. Y. 526, reversing 48 Hun, 409, distinguishing *Lichtenburg v. Herdfelter*, 103 N. Y. 302. The plaintiff, as a creditor, on the refusal of the administrator to bring such an action, is at liberty to do so, making the administrator party defendant, with a view to the same equitable relief which would have been awarded if she had been party plaintiff. *National Bank v. Leary*, 127 N. Y. 549. The rule is reiterated in *Prentiss v. Bowden*, 145 N. Y. 342.

Where an action is brought under § 1, chapter 314, Laws 1858, as it now stands, and the plaintiff fails to sue on behalf of himself

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and other creditors, such defect is waived by the failure of the defendant to raise the question by answer or demurrer. *Brown v. Brown*, 83 Hun, 160, affirmed, 146 N. Y. 385, on opinion below.

This statute includes the public administrator; *Levin v. Russell*, 42 N. Y. 251; a general assignee; *Southard v. Benner*, 72 N. Y. 424; *Ball v. Slafter*, 26 Hun, 353; *Niagara Co. Bank v. Lord*, 33 Hun, 560; an executor or administrator; *Gardner v. Lansing*, 28 Hun, 413; it does not apply to a receiver *pendente lite*; *Ogden v. Arnot*, 29 Hun, 151; nor in supplementary proceedings. *Pettibone v. Drakeford*, 37 Hun, 628. An administrator may bring an action to set aside, as fraudulent as against creditors, a conveyance made by his intestate, where it appears that there are creditors whose debts were in existence at the time of the making of the conveyance of the personal property wherewith to satisfy their claims. Where, in such an action, it appears that the property has passed from the hands of the fraudulent grantee to a *bona fide* purchaser, it seems that a recovery may be had against such fraudulent grantee for the damages sustained by the estate. *Boston v. Horner*, 29 Hun, 467. The act gave a new remedy in favor of creditors at large, which the assignee might enforce without acquiring a specific lien, and in spite of his situation as successor of the fraudulent assignor. *Leonard v. Clinton*, 26 Hun, 288, citing *Southard v. Benner*, 72 N. Y. 424, *supra*; *Fort Stanwix Bank v. Leggett*, 51 N. Y. 554; *Ceas v. Bramley*, 18 Hun, 187; *Jones v. Jones*, 41 Hun, 163. The assignee represents creditors, and may treat as void all agreements made in fraud of their rights; he has greater power for this purpose than the creditor himself. The creditor can assert no right until, by judgment and execution, he has obtained a lien, or a right to a lien, upon the specific property; but in favor of an assignee for his benefit, the legislature has substituted statutory right in place of these conditions. Danforth, J., in *Reynolds v. Ellis*, 2 St. Rep. 790, 103 N. Y. 115, affirming 34 Hun, 47, cited, *Button v. Rathbone, Sard & Co.* 43 Hun, 147.

It is the right and duty of an administrator or executor of a deceased debtor, whose estate is insolvent, to impeach a sale of personal property by the deceased with intent to defraud creditors, and recover the same from the fraudulent vendee. If the executor or administrator collude with the fraudulent vendee, or, after reasonable request, refuse to bring suit, a creditor may main-

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tain an action making such executor a defendant. *Bale v. Graham*, 11 N. Y. 237. It is the duty of an administrator to pursue real estate of a decedent and reclaim it for the benefit of persons interested, and no one creditor can appropriate it for his sole benefit, and the surrogate may compel an executor to act, even though he is one of the fraudulent grantees. *Lichtenburg v. Herdtfelter*, 3 St. Rep. 91, 103 N. Y. 302. Proof of the appointment of a receiver, and vesting of title of the real property in him, and showing that a deed is fraudulent, makes out a case in equity, calling on defendant to show why the deed should not be set aside. It is not necessary, under chapter 314, Laws 1858, to show an execution returned unsatisfied. *Hyatt v. Dusenbury*, 5 St. Rep. 846. Under this statute an administrator may disaffirm a chattel mortgage executed by deceased in fraud of creditors, and may maintain an action against the mortgagee for property taken by him under the mortgage. *Potts v. Hart*, 99 N. Y. 168. But an assignee cannot set aside a chattel mortgage merely upon the ground it was not filed, since that is not a fraudulent act. *Crisfield v. Bogardus*, 18 Abb. N. C. 334. Prior to the entry of judgment, a mortgagor executed a valid general assignment of all his property for the benefit of creditors. *Held*, that said creditors were not in a position to attack the validity of the mortgage, as they had no lien upon the premises, and the assignee alone could make the attack; the creditors were not necessary parties to the action. *Spring v. Short*, 90 N. Y. 538. It seems that if an assignee refuses, in a proper case, to proceed and get in the assigned property, the creditors collectively, or one in behalf of all who may come in and join, may come in and compel the execution of the trust in equity, or may cause the removal of the assignee and the appointment of another; in either case, however, decree for single debt would be erroneous; the decree must follow the assignment, and the fruits of the recovery be distributed according to its terms. *Crouse v. Frothingham*, 97 N. Y. 105. See 103 N. Y. 302, *supra*. The remedy of the individual creditors in such a case is taken away from them and devolves upon the trustee, and their rights are subject to the direction for distribution given by the assignment. *Swift v. Hart*, 35 Hun, 129, following 90 N. Y. 538, and 97 N. Y. 105, *supra*; and *Childs v. Kendall*, 30 Hun, 227; *Lowery v. Clinton*, 32 Hun, 267, disapproving *Leonard v. Clinton*, 26 Hun, 288. In such case the title is vested

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in the assignee, and the judgment-creditors cannot maintain an action to set aside fraudulent incumbrances; no judgment could be recovered which would entitle them to take the assigned property and apply it to payment of their debt. *Sullivan v. Miller*, 40 Hun, 516. It is held in *Kamp v. Kamp*, 46 How. 143, per Leonard, referee, that an action to set aside a fraudulent conveyance may be maintained by a creditor at large, who is otherwise remediless; *e. g.*, a woman having an unsatisfied claim for alimony.

An action by a general creditor of a deceased insolvent debtor, under chapter 740, Laws 1894, to set aside an alleged fraudulent conveyance, in which the plaintiff's alleged claim, consisting of many items of credits and debits, is denied, is compulsorily referable. *National Shoe & Leather Bk. v. Baker*, 148 N. Y. 581, 42 N. E. Rep. 1077, affirming 90 Hun, 277, 35 N. Y. Supp. 933, 70 St. Rep. 600.

SUB. 4. PARTIES PLAINTIFF.

Individual creditors may join as plaintiffs in a creditor's suit, but the complaint must show a right in common to the relief demanded. *Tabor v. Bunnell*, 10 Week. Dig. 551; *Lentilhon v. Moffat*, 1 Edw. 451; *Dix v. Briggs*, 9 Paige, 595; *Murray v. Hay*, 1 Barb. Ch. 59. Or a creditor may sue alone. *Greene v. Breck*, 32 Barb. 73. A creditor may commence a suit for his own benefit or on behalf of himself and all others similarly situated, who may choose to come in. *Hammond v. Hudson R. etc. Co.* 20 Barb. 378; *Edmeston v. Lynde*, 1 Paige, 637; *Wakeman v. Grover*, 4 Paige, 23; *Habicht v. Pemberton*, 4 Sandf. 657; *Brownson v. Gifford*, 8 How. 389. If he sues for others, he must aver the existence of others, or state facts upon which judgment can be given in their favor. *Elwell v. Johnson*, 3 Hun, 558; appeal dismissed, 74 N. Y. 80. An action may be maintained by separate creditors of an estate to compel an accounting and set aside a fraudulent transaction. *Paff v. Kinney*, 5 Sandf. 380; *Petree v. Lansing*, 66 Barb. 357. One of several co-sureties, having paid the whole of a judgment against them, may maintain a creditor's bill, after return of execution unsatisfied. *Cuyler v. Ensworth*, 6 Paige, 32. The assignee of a judgment may maintain a bill if execution has been issued by the assignee and returned unsatisfied. *Gleason v. Gage*, 7 Paige, 121. The assignee of merely the obligation on which the judgment was recovered cannot maintain a bill. *Strange v. Longley*, 3 Barb. Ch. 650. A mortgagee who has sued his bond

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to judgment may maintain the action, unless the land has become the primary fund for the payment of the debt. *Palmer v. Foote*, 7 Paige, 457.

It is said one entitled to a sequestration of personal estate and rents and profits, in an action for divorce, may maintain an action to set aside defendant's fraudulent transfer of real estate. *Kemp v. Kemp*, 46 How. 143; *Donnelly v. West*, 17 Hun, 564. It is said that a judgment for alimony, with execution unsatisfied, will sustain the action. *Miller v. Miller*, 1 Abb. N. C. 30. Where creditors are so numerous that it is impracticable to join them all, preferred creditors may sue for themselves and the others. *Brooks v. Peck*, 38 Barb. 519. An action to set aside certain provisions of an assignment, and to carry it out as modified, should be brought for the benefit of all who come in and contribute to the expense. *Cox v. Platt*, 32 Barb. 126. Where there are several actions brought on behalf of all, all may be compelled to come in in the one first brought. *Travis v. Myers*, 67 N. Y. 542. Where by statute no preference can be given, but the fund is applicable to all the creditors *pro rata*, the action should be brought for the benefit of all. *Innes v. Lansing*, 7 Paige, 583; *Greene v. Breck*, 32 Barb. 73; *Hammond v. Hudson, etc. Co.* 20 Barb. 378.

Where the conveyance is kept secret, and the debtor remains in possession, an action may be maintained by a judgment creditor for a debt subsequently contracted. *Shand v. Hanley*, 71 N. Y. 319. Where an action is brought by one creditor on behalf of himself and the others, none but the plaintiff is bound by the proceedings therein till final judgment. *Derby v. Yale*, 13 Hun, 273. A creditor's action is not an action on contract in such sense that it can be maintained by highway commissioners to avoid a fraudulent conveyance. *Albro v. Rood*, 24 Hun, 72. An individual creditor of a surviving partner cannot maintain a creditor's action to set aside a general assignment of the assets of the firm made by the surviving partner, the right to do so is in the representatives of the deceased partner, and perhaps in the partnership creditors. *Haynes v. Brooks*, 17 Abb. N. C. 152. A judgment creditor, whose judgment is a lien on premises covered by a usurious mortgage, has a right to have it avoided, but only so far as it appears it affects his judgment. *Van Tassel v. Purdy*, 5 Week. Dig. 505. A judgment creditor of a limited partnership, after execution returned unsatisfied, may maintain an action to

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set aside as void an assignment by the firm. *Fanshawe v. Lane*, 16 Abb. 71; *Greene v. Breck*, 32 Barb. 73. Where a receiver, appointed in an action against a corporation, fraudulently obtains an order for the sale of a debt due the corporation, a creditor may maintain an equitable action to vacate the sale. *Hackley v. Draper*, 60 N. Y. 88. A creditor's bill will lie to reach personal as well as real property claimed to have been transferred in fraud of creditors. *McClosky v. Stewart*, 63 How. 137. A judgment creditor of a foreign corporation may, after execution returned, sue here an individual having property of the corporation, to compel its application to his debt. *Bartlett v. Drew*, 60 Barb. 648, affirmed, 57 N. Y. 587. But a judgment creditor of an insolvent corporation gets no preference by filing a bill. *Masters v. Rossie, etc. Co.* 2 Sandf. Ch. 301.

Creditors having a lien on the property of a corporation may follow it. Where the property has been divided among the stockholders, a judgment-creditor, after execution, may maintain an action against them in the nature of a creditor's bill. *Hastings v. Drew*, 76 N. Y. 9. Only such creditors as are at the time of the commencement of the action in the same situation as the plaintiffs, that is, have judgments upon which executions have been issued and returned unsatisfied, are entitled to share in the proceeds, and the plaintiffs are entitled to priority as against all general creditors who subsequently recover judgments. *Clafflin v. Gordon*, 39 Hun, 54. While judgment-creditors holding distinct and several judgments may unite in an action to set aside a conveyance of land by the common debtor, made in fraud of their rights as creditors, they are not all necessary parties to such an action; and where one of them has commenced such an action, the court does not require the plaintiff to bring in other creditors, and an order denying the application of such other creditors to intervene is discretionary and not reviewable in Court of Appeals. *White's Bank of Buffalo v. Farthing*, 101 N. Y. 344. The grantor of land to a married woman, who received the price from her husband, cannot complain it was a fraud on himself as a creditor. *Phillips v. Wooster*, 36 N. Y. 412. An action cannot be maintained to set aside a conveyance to a defendant to delay and hinder creditors of such plaintiff; the allegation that plaintiff had great confidence in defendant, and acted under his advice, makes no difference. *Renfrew v. McDonald*, 11 Hun, 254. A creditor's

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bill may be maintained though less than \$50 is due on the judgment. *Sarsfield v. Van Vaughner*, 38 Barb. 444. One judgment-creditor cannot maintain an action against another to determine their liens upon equitable property in the hands of the receiver. *Myrick v. Selden*, 36 Barb. 15. A judgment-creditor of the firm, who has had execution returned against the survivor, may maintain an action against the legal representatives of the deceased. *Yates v. Hoffman*, 5 Hun, 113. In a creditor's action to set aside a fraudulent conveyance, made by an administrator of a deceased judgment-debtor's assets, and to have them applied generally in payment of the debts, the creditor need not have obtained judgment and execution. *Everingham v. Vanderbilt*, 51 How. 177, affirmed, 12 Hun, 75.

It is held in *Fisher v. Hubbell*, 7 Lans. 481, that a creditor of a decedent may maintain an action against the debtor of such estate where the administrator stands in a hostile position to such claim, or refuses to sue, as where the administrator of the creditor estate is executor of the debtor estate. But see *Lichtenburgh v. Herdtfelder*, 103 N. Y. 302, *supra*. As to precedence in case assignee in bankruptcy refuses to sue, see *Bates v. Bradley*, 24 Hun, 84. Any one of the heirs at law of a grantor may maintain an action to set aside a fraudulent conveyance. *Smith v. Mcaghan*, 28 Hun, 423. Plaintiff may bring an action to set aside a conveyance *pendente lite*, and defendant's sureties on appeal, who have paid the claim, may be subrogated to the rights of the judgment creditor, though they were cognizant of the fraud. *Martin v. Walker*, 12 Hun, 46. A deed, fraudulent as to creditors, may be set aside although the grantee was not party to the fraud. *Salomon v. Moral*, 53 How. 342. One who sells goods to a person, after a conveyance by him, presumptively fraudulent as to creditors, but before change of possession, is a creditor within the statute. *Arrowsmith v. O'Sullivan*, 44 Super. Ct. 573. The mere fact that a man executes a mortgage for a usurious lien does not make the transaction fraudulent, nor does it necessarily give the creditor a right to intervene to set aside the security. *Marx v. Tailer*, 12 Civ. Pro. R. 226.

A judgment-creditor may bring the action on his own behalf. *Reubens v. Joel*, 13 N. Y. 488. Or on behalf of himself and others similarly situated. *Hammond v. Hudson River I. and M. Co.* 20 Barb. 378.

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An action will lie by a judgment-debtor of a domestic corporation, to set aside a general assignment for the benefit of creditors, made by it as an obstruction to the enforcement of the plaintiff's judgment. The right to maintain such an action is not affected by the provisions of § 1879. *Muller v. Scandinavian Emigrant Co.* 1 N. Y. Annotated Cases, 397.

In case of general assignment where it is sought to set it aside upon the ground of fraud, it is not all creditors who may assail it, since the assignment may be void as to creditors who choose to disaffirm, but valid as to those creditors who are provided for in it and have accepted benefits under it. *Mills v. Argal*, 6 Paige, 577; *Pratt v. Adams*, 7 Paige, 615; *Hone v. Henriquez*, 13 Wend. 240; *Moller v. Tuska*, 87 N. Y. 166; *Conrow v. Little*, 115 N. Y. 387; *Terry v. Munger*, 121 N. Y. 161. See, however, opinion Judge Gray in *Mills v. Parkhurst*, 126 N. Y. 89.

The mere presentation of claim by a creditor to the assignee is not sufficient to indicate an acceptance of benefit under the assignment on his part so as to estop him from assailing the assignment. *Turney v. Van Gelder*, 68 Hun, 481; 52 St. Rep. 664; *Thompson v. Fry*, 51 Hun, 296; *Schofield v. Scott*, 20 St. Rep. 815; *Talcott v. Hess*, 4 St. Rep. 62.

But acceptance of a dividend under the assignment is regarded as an estoppel upon the creditor. *Babcock v. Dill*, 43 Barb. 577.

None but judgment-creditors can maintain such an action. *Andrees v. Durant*, 18 N. Y. 496; *Adce v. Bigler*, 81 N. Y. 349; *Southard v. Benner*, 72 N. Y. 424; *Frothingham v. Hoddenpyle*, 135 N. Y. 630.

SUB. 5. PARTIES DEFENDANT.

The judgment debtor is a proper party to an action to set aside as fraudulent a conveyance made by him, brought by the receiver of his effects, appointed in supplemental proceedings. *Allison v. Weller*, 6 T. & C. 291, affirmed, 66 N. Y. 614; *Shaver v. Brainard*, 29 Barb. 25. In an action to set aside an assignment of a bond and mortgage by a judgment-debtor, in fraud of creditors, the debtor is a necessary party. *Miller v. Hall*, 70 N. Y. 250. The judgment-debtor is a necessary party to an action to set aside an assignment as fraudulent. *Wallace v. Eaton*, 5 How. 99; *Bennett v. McGuire*, 58 How. 625; *Lawrence v. Bank of the Republic*, 35 N. Y. 320; or to set aside a contract made by him; *Palen v.*

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Bushnell, 18 Abb. 301; or to have his assets applied to the payment of plaintiff's judgment; *Monroe v. Galveston, etc. Co.* 19 Abb. 90; or to reach his interest in a trust fund. *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190. The debtor's assignee should be a party. *Hammond v. Hudson, etc. Co.* 20 Barb. 378; *Gray v. Schenck*, 4 N. Y. 460. In a suit to set aside as void an assignment for the benefit of creditors where the assignee is not in possession of the premises, and plaintiff neither seeks relief against the assignee or to reach the proceeds, the assignee is not a necessary party. *Jessup v. Hulse*, 29 Barb. 539, reversed on another point, 21 N. Y. 168. In *Chandler v. Powers*, 25 Hun. 445, it is held that creditors preferred, under a general assignment, are entitled to be made parties to an action to annul it. Where assignments by a debtor to a third party, and by such party to defendant's wife are sought to be set aside, such third party is a necessary party. *Bennett v. McGuire*, 5 Lans. 183. Although, in a creditor's suit, to set aside a general assignment for the benefit of creditors, a preferred creditor is not a necessary party defendant; yet, where it is alleged that such creditor has received a sum of money under his preferences which he withholds, and an accounting is asked, he is a proper party. *Genesee Bank v. Bank of Batavia*, 43 Hun. 295. The assignee represents the creditors in an assignment. *Bank of British N. A. v. Suydam*, 6 How. 379. See *Wheeler v. Wheelodon*, 9 How. 293.

In a suit to set aside a general assignment, where it is alleged and conceded that the property alleged to have been fraudulently conveyed did not pass by the assignment, the general assignee is not a necessary party, and in any event the objection must be taken by answer or demurrer, or it will be waived. *McCrery v. Gordon*, 38 Hun. 467. Plaintiff may join as defendants all persons who are fraudulent grantees in the common design to hinder, delay or defraud him. *Merchants' Bank of Rochester v. Thalheimer*, 23 Week. Dig. 116. All the grantees and incumbrancers should be defendants, though they took in separate parcels and at different times. *Wade v. Rusher*, 4 Bosw. 531; *Jacob v. Boyle*, 18 How. 106; *Sage v. Mosher*, 28 Barb. 287; *Newbould v. Warrin*, 14 Abb. 80; *Boyd v. Hoyt*, 5 Paige, 65; *Reed v. Stryker*, 12 Abb. 47; *Morton v. Weil*, 11 Abb. 421; *Durand v. Hangerson*, 39 N. Y. 287; *Fellows v. Fellows*, 4 Cow. 682. An assignee, having recovered judgment on some choses in action assigned to him,

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reassigned. *Held*, that he was a proper party defendant. *Wetmore v. Candee*, 49 N. Y. 667. All parties against whom judgment was recovered should be defendants. *Bennett v. McGuire*, 58 Barb. 625; *Child v. Brace*, 4 Paige, 309; *Commercial Bank v. Meach*, 7 Paige, 449. But not so in case of insolvency of a defendant, or absence from the jurisdiction on stating facts in the complaint. *Van Cleef v. Sickles*, 5 Paige, 505. It is said that a joint-debtor not served is a proper party; but in *Fox v. Moyer*, 54 N. Y. 125, it was held that where one of two joint-debtors has made a fraudulent conveyance the other debtor is neither a necessary or a proper party. A creditor's action cannot be maintained against the separate property of a joint debtor not served. *Field v. Chapman*, 13 Abb. 434. But it is said that one who innocently took as trustee and conveyed to a third person is not a necessary party. *Spicer v. Hunter*, 14 Abb. 4. If one who receives property under a fraudulent transfer re-transfers it, he is not liable to one who obtained no specific lien before the transfer. *Cramer v. Blood*, 57 Barb. 671, affirmed, 48 N. Y. 684.

It is held, in *Stafford v. Mott*, 3 Paige, 100, that a debtor of the debtor is a proper party, though not a necessary party. If a creditor, under a prior judgment, is not made a party, the purchaser takes subject to such judgment. *Scouten v. Bender*, 3 How. 185. One who, in good faith, purchases property under a fraudulent sale or assignment, should not be held liable in an action to set it aside and reach the property. *Dunham v. Waterman*, 17 N. Y. 9. Persons who combined to procure a judgment by fraud, are proper, though not necessary, parties to a suit against the judgment-creditor to set it aside. *Huggins v. King*, 3 Barb. 616. Although the heirs of the deceased grantor are proper parties to an action by a judgment-creditor to set aside a deed as fraudulent, for the purpose of determining whether a legal estate vested in the grantee as against them, yet if omitted, a judgment may be entered declaring the deed void as to plaintiff and his judgment a lien on the lands. *Young v. Heermans*, 66 N. Y. 374. In an action by a receiver to have set aside as fraudulent an assignment of a bond and mortgage made by the judgment-debtor, the latter is a necessary party. *Miller v. Hall*, 70 N. Y. 250.

An assignor making a general assignment is a necessary party to the action, or if he dies during its pendency, should be revived

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against his representative. *Hubbell v. Merchants' National Bank*, 42 Hun, 200; *Miller v. Hall*, 40 Super. 262, affirmed, 70 N. Y. 250; *Lawrence v. Bank of Republic*, 35 N. Y. 320; *Edwards v. Woodruff*, 90 N. Y. 396. And in such a case, although all creditors are presumed to be represented by the general assignee, they may be allowed to intervene as parties. *Davies v. Fish*, 47 Hun, 314; *Chandler v. Powers*, 25 Hun, 445.

Where a creditor's action was brought to reach possession of property transferred by the judgment-debtor separately to different defendants, among whom no conspiracy was alleged to exist, and an accounting was demanded against each, *held*, that while the complaint united several causes of action improperly, the objection was waived if not taken by demurrer or answer, and the action should be sustained if either of the causes of action alleged was made out. *Barnard v. Brown*, 43 St. Rep. 602, 17 Supp. 313.

SUB. 6. PLEADINGS.

The burden of charging, as well as proving fraud, is on the party setting it up, and while it is not necessary or proper that he should spread out in a pleading the evidence on which he relies, he must aver, fully and explicitly, the facts constituting the alleged fraud. *Butler v. Vile*, 44 Barb. 166. An admission of facts, constituting frauds in pleadings, must prevail over a mere unexplained denial of fraudulent intention. *Dykens v. Woodward*, 7 How. 313; *Churchill v. Bennett*, 8 How. 309. If a party avers fraud, he is bound to so aver it that his opponent shall have notice of it and an opportunity to meet it. *Hilsen v. Libby*, 44 Super. Ct. 12. The complaint in a creditor's suit to reach property disposed of by means of a fraudulent conveyance must allege the issuing of an execution. *Allyn v. Thurston*, 53 N. Y. 622, explained and applied in *Barton v. Hosner*, 24 Hun, 467, and *Estes v. Wilcox*, 67 N. Y. 264. It is not sufficient to allege insolvency; *Adsit v. Sanborn*, 23 Hun, 45; *Tabor v. Bunnell*, 10 Week. Dig. 551; and it must allege that the execution was issued to the county where the debtor resides; *Payne v. Sheldon*, 63 Barb. 169; *Baldwin v. Ryan*, 3 T. & C. 251; *Hope v. Brinckerhoff*, 3 Edw. Ch. 446; *Campbell v. Foster*, 16 How. 275; or if a non-resident, to the county where the judgment-roll is filed. *Voerhees v. Howard*, 4 Keyes, 371; *Reed v. Wheaton*, 7 Paige, 363. The allegation that the remedy has been exhausted by issue and return of

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execution unsatisfied is required by *Crippen v. Hudson*, 13 N. Y. 161; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561. And see cases cited showing when action can be maintained, *supra*; also *Adsit v. Butler*, 87 N. Y. 585. In an action to set aside a fraudulent transfer, a fraudulent intent must be alleged as well as proved. *Bailey v. Rider*, 10 N. Y. 363; *Genesee National Bank v. Mead*, 18 Hun, 303; *Rome Exchange Bank v. Kirkland*, 1 Keyes, 588. The complaint should allege the existence of the judgment and the facts constituting it a lien. *Parshall v. Tillou*, 13 How. 7; *Reubens v. Joel*, 13 N. Y. 488. A complaint which states that plaintiff is a judgment-creditor of one of the defendants having an execution returned unsatisfied; that a chattel mortgage was executed by the debtor and taken by his co-defendant with intent to hinder, delay and defraud the creditors of the former; that the mortgagee has sold the property and converted the proceeds, is sufficient as a creditor's bill. *Murtha v. Curley*, 90 N. Y. 372. To entitle a plaintiff to maintain an action to set aside a conveyance of his debtor, he must show that he is a judgment-creditor and that the conveyance was fraudulent in fact, and stands in the way of the collection of his judgment. *Carpenter v. Osborn*, 102 N. Y. 552. In a complaint to set aside a fraudulent conveyance, it is sufficient to charge that it was made with intent to hinder, delay and defraud creditors of the assignor, and is, therefore, fraudulent and void; it need not go into detail as to the fraud claimed. *Mott v. Dunn*, 10 How. 225; *Wilson v. Forsyth*, 24 Barb. 105; *Hastings v. Thurston*, 18 How. 530; *Jessup v. Hulsc*, 21 N. Y. 168; *Dudley v. Danforth*, 61 N. Y. 626. The rule that a complaint in a creditor's action to remove a fraudulent obstruction by the judgment-creditor must show that such removal will enable the judgment to attach to the debtor's property, was applied as between a judgment-creditor and a prior assignee for the benefit of creditors in *Lourey v. Clinton*, 32 Hun, 267, citing *Smillie v. Quinn*, 90 N. Y. 492. A complaint in a creditor's suit which alleges that the conveyance sought to be set aside was made with intent to hinder, delay and defraud creditors, cannot be sustained by proof that the conveyance can be deemed in trust for the benefit of the grantor, beyond the cost of his support, and as to the surplus liable to creditors. *Third National Bank v. Cornes*, 2 St. Rep. 543. Where the facts which made a sale by a receiver, which plaintiff

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sought to set aside on the ground of fraud, void, were not alleged in the pleadings; *held*, evidence of them not adduced to prove the fraud was incompetent. *Hackley v. Draper*, 4 T. & C. 614, affirmed, 60 N. Y. 88. Where the complaint, in addition to the allegations that the judgment-debtor had made an assignment, set forth that other conveyances had been made by the debtor to various persons made defendants, for the purpose of defrauding his creditors, no privity being alleged between the defendants, and the complaint asked to have the assignment and conveyance set aside, *held*, there was no misjoinder of parties and causes of action. *Reed v. Stryker*, 12 Abb. 47, Court of Appeals.

A complaint to set aside a fraudulent conveyance contained an allegation that the grantee in the conveyance became the real party in interest in the action in which the judgment was obtained, and was liable for costs, but because the conveyance was made prior to docketing the judgment, the grantee held the lands apparently free of the lien. *Held*, not sufficient to constitute an independent cause of action, and the complaint was not demurrable as improperly uniting several causes of action. *Reed v. Davis*, 14 Week. Dig. 516. A complaint seeking to reach funds of a judgment-debtor in the hands of a testamentary trustee, which alleges the terms of the trust, that the trustees have assumed the same, and have in their hands a surplus over and above the sum necessary for the support and maintenance of the *cestui que trust* and those dependent upon him, and asking that the court fix the allowance to the *cestui que trust*, and that the surplus be applied in payment of the debt, states a sufficient cause of action. *McEvoy v. Appleby*, 27 Hun, 44. An action by a judgment-creditor against his debtor and another creditor, who is alleged to have fraudulently obtained possession of the debtor's property, will be sustained on the plaintiff's establishing a prior equity to that of the other creditor, though he fails to prove fraud, which is the gravamen of the complaint. *Heim v. Davenport*, 45 Super Ct. 523. In an action by a judgment-creditor to set aside a conveyance from husband to wife, through a third person, she may show fraud and collusion between the husband and the creditor with intent to charge her property with the debt of the husband. *Wells v. O'Connor*, 27 Hun, 426. As to what is sufficient averment in action against heirs and devisees, see *Rockwell v. Geery*, 4 Hun, 606. Where the complaint contains allegations which will authorize the court

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to treat the case as within the statute providing for actions not resting in the fraudulent disposition of property, relief may be granted upon that theory, notwithstanding allegations of fraudulent intent which the plaintiff does not succeed in establishing. *Chadwick v. Burrows*, 42 Hun, 39.

While it is not necessary to set forth the specific fraudulent acts relied upon by plaintiff to establish a fraudulent intent, *Durant v. Pierson*, 29 St. Rep. 510; *Pittsfield Nat. Bank v. Tailer*, 60 Hun, 130; yet the complaint should allege the recovery of the judgment and return of an execution, and fully set forth that the assignment was made with intent to hinder, delay and defraud creditors. *Adsit v. Butler*, 87 N. Y. 585.

The complaint may set out all fraudulent conveyances made by the debtor. *Chandler v. Powers*, 9 St. Rep. 169; *Loos v. Wilkinson*, 110 N. Y. 195.

Precedent for Complaint Asking for Appointment of Receiver and Injunction.

SUPREME COURT — ULSTER COUNTY.

THE NATIONAL BANK OF RONDOUT

agst.

BENEDICT DREYFUS AND ROSE, HIS
WIFE, EDWARD DREYFUS AND FLORA,
HIS WIFE, LEWIS GANS AND MARY
GANS, HIS WIFE.

96 N. Y. 676.

The plaintiff, for his complaint, respectfully shows to the court, that heretofore and on or about the 13th day of January, 1876, in this court, in an action then pending in said court in the county of Ulster, in which action this plaintiff, the National Bank of Rondout, was plaintiff and the defendant Benedict Dreyfus was defendant, the said plaintiff duly recovered judgment against the said defendant for the sum of \$3,331.72 damages, and \$166.64 costs; in all the sum of \$3,498.36; that on said day the judgment-roll in said action was duly filed and the judgment duly docketed in said county; that on the 18th day of January, 1876, an execution, in due form of law, against the personal and real property of the said Benedict Dreyfus, was issued upon the said judgment to the sheriff of the county of Ulster, in which said county said defendant then resided and still resides; that said execution was thereafter and prior to the commencement of this action duly returned to the office of the clerk of said county of Ulster, wholly unsatisfied by said sheriff, and that there is still due to the said plaintiff from said defendant upon said judgment the said sum of \$3,498.36, with interest thereon from

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January 13, 1876; that after the indebtedness which said judgment was based upon and obtained was contracted, but previous to the recovery of said judgment, the said defendant Benedict Dreyfus was the owner in fee-simple and possessed of certain lots and valuable tracts of lands situate, lying and being in the city of Kingston, in the said county of Ulster, New York; that said lots were of the value of \$10,000, being fully sufficient to satisfy said judgment and out of which the same might have been fully collected upon the said execution but for the collusive and fraudulent practices and contrivances hereinafter particularly described.

(Here follows description of the property.)

That heretofore and after the said indebtedness was incurred, but previous to the recovery of said judgments, but at what precise date this plaintiff is unable at present to particularly state, the said Benedict Dreyfus and Rose, his wife, by two certain deeds of conveyances in writing, conveyed, or attempted to convey, the above described premises and real estate to the defendant Edward Dreyfus, one of such deeds or conveyances purporting to convey the six several lots or parcels of land first above described, and which said deed was recorded in the office of the clerk of the county of Ulster, etc. (Same recital as to any other deeds.)

That the first of said deeds above mentioned bears date the 7th day of September, 1874, and is given for the nominal consideration, as therein stated, of \$10,000, and the second of said deeds above mentioned, bears date the 7th day of August, 1874, and is given for the nominal consideration, as therein stated, of \$800, but that both of said deeds were actually executed and delivered long after they bear date, and after the aforesaid indebtedness was incurred, and were absolutely without consideration; that said conveyances were made, executed and delivered by the said Benedict Dreyfus and Rose, his wife, and received and accepted by the said Edward Dreyfus with intent to hinder, delay and defraud the just creditors of the said Benedict Dreyfus of their lawful damages, forfeitures, debts and demands, and particularly to so hinder, delay and defraud the plaintiff herein, and that such conveyances were made, executed and delivered by the said Benedict Dreyfus and Rose, his wife, and accepted by the said Edward Dreyfus in trust for the use of the said Benedict Dreyfus; that the deed to the said Gans was given for the nominal consideration of \$8,200, but that said deed was actually given absolutely without consideration; that said conveyance was made, given, executed and delivered by the said defendant Dreyfus and Flora, his wife, and received and accepted by the said Lewis Gans with intent to hinder, delay and defraud the just creditors of the said Benedict Dreyfus of their lawful suits, damages, forfeitures, debts and demands, and particularly to so hinder, delay and defraud the plaintiff herein, and that such deed or conveyance was made, executed and delivered by the said Edward Dreyfus and Flora, his wife, and accepted by the said Lewis Gans in trust for the use of the said Benedict Dreyfus; that all of said conveyances were part of a collusive and fraudulent conspiracy to prevent the collection of the judgment hereinbefore set forth; that the said defendant Benedict Dreyfus

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has no other property than that attempted to be conveyed by the said deeds or assignments out of which the judgment hereinbefore set forth can be collected, and that unless such conveyances be set aside by the decree or judgment of this court and the plaintiff be allowed to collect such judgment out of the above-described real estate, the same must remain wholly unpaid; that the said defendant Edward Dreyfus now claims to own and is seized in fee-simple of all and singular the five several lots or tracts of land last above described, by virtue of the attempted and pretended conveyance of said lots to him, above set forth, and collusively and fraudulently given and accepted as aforesaid; that the said defendant Flora Dreyfus is a married woman, the wife of the defendant Edward Dreyfus, and, therefore, if he obtained any title whatever to said premises by reason of the said conveyances, collusively and fraudulently made as aforesaid, she is seized of an inchoate right of dower therein; that the said defendant Lewis Gans now claims to own and be seized in fee-simple of the six lots or tracts of land first above described, by virtue of the attempted and pretended conveyance of said land to him, above set forth, and collusively and fraudulently given and accepted as aforesaid; that the defendant Mary Gans is a married woman, the wife of the said defendant Lewis Gans, and, therefore, if he has obtained any title whatever to said premises by reason of the said conveyances collusively and fraudulently made as aforesaid, she is seized of an inchoate right of dower therein.

Wherefore the plaintiff demands judgment:

First. That the said deeds or conveyances above described, made by said Benedict Dreyfus and Rose, his wife, to the said Edward Dreyfus, and the deed or conveyance, above described, made by said Edward Dreyfus and Flora, his wife, to the said Lewis Gans, may each be denied and adjudged fraudulent and void as against the creditors of said Benedict Dreyfus and particularly as against this plaintiff.

Second. That a receiver of the said real property and of all the property and effects of the said Benedict Dreyfus be appointed.

Third. That the defendants, and each of them, be adjudged to account for all moneys received by them, or either of them, under the deeds or conveyances before described, and for the proceeds, rents and profits of the real estate therein purporting to be conveyed, and that they deliver said property, proceeds, rents and profits to said receiver.

Fourth. That the said defendants, and each of them, be in the meantime enjoined and restrained from selling, transferring, assigning or in any way interfering with said real property, or any part thereof.

Fifth. That the said receiver be authorized and directed to sell or dispose of said real property, or so much thereof as shall be necessary, and out of the proceeds thereof to pay the aforesaid judgment and the costs and expenses of this action, and hold the balance for the further order of this court.

Sixth. And for such further or other relief as to the court may seem just.

LINSON & VAN BUREN,

Attorneys for Plaintiff.

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Precedent for Complaint to Set Aside Assignment and Conveyances and for Receiver and Injunction.

SUPREME COURT — ULSTER COUNTY.

William B. Ennist

agst.

Jacob L. DeWitt, as General Assignee of Lucius Lawson, and Individually, Chauncey Stewart, Charles H. Pinney, and Mary J. Pinney, his Wife, Lucius Lawson, and Arrietta, his Wife, and others.

The plaintiff herein respectfully shows to this court that on the 19th day of June, 1885, this plaintiff recovered a judgment in the Supreme Court of this State for the sum of \$606.38, damages and costs, which was duly docketed in Ulster county clerk's office, against Lucius Lawson, and that thereafter and before the commencement of this action, execution was duly issued thereon to the sheriff of Ulster county, in which county the said Lucius Lawson resided at the time of the entry of said judgment, and has ever since resided, and which said execution has heretofore been returned by said sheriff of Ulster county wholly unsatisfied; this plaintiff further shows that on the 20th day of November, 1884, the defendant Lucius Lawson executed and delivered to the grantee named therein an instrument in writing purporting to be a general assignment for the benefit of his creditors, of all his property to defendant Jacob L. DeWitt, with certain preferences therein set forth, which trust was therein accepted by said DeWitt, which said instrument is recorded in Ulster county clerk's office in book of deeds No. 254, page 295, etc., to which reference is hereby made; that on the 19th day of November, 1884, the said Lucius Lawson made and executed and delivered to the defendant Charles H. Pinney an instrument in writing in and by which he conveyed to said Pinney, for a consideration, as there alleged, of \$1,200, certain property in the town of Hurley, therein described at length, to which conveyance, recorded in book 253 of deeds, page 630, in Ulster county clerk's office, reference is made for a full description of said property; that said instrument was made, executed and delivered by said Lawson in contemplation of the general assignment above set forth, and is part of the scheme for disposing of his property; that at the time of the delivery of said deed and previous thereto it was understood, agreed and arranged by and between the defendant Lawson and the defendant Pinney that the said deed was given to secure said Pinney the sum of \$1,200, due and owing him from Lawson, and that, in case any other or further sum should be realized from sale of said premises by said Pinney, the excess thereof, over and above said sum of \$1,200, should be returned to said Lawson for his sole use and benefit; or in case the said property should be mortgaged for a sum in excess

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of the sum of \$1,200, the said Pinney would convey the said premises subject to said mortgage to the wife of defendant Lawson for the use an benefit of the said Lawson; that thereafter the defendant Pinney mortgaged said property to one Evangela Hayes for the sum of \$1,500, and out of the proceeds received the sum of \$1,200, being the amount of his debt, and paid out the balance under the direction of said Lawson and for his benefit and at his request; that the said property was in fact at that time and now is worth the sum of \$2,500, and that such value was well known to said Lawson and said Pinney at the time of said transfer, and it was understood and intended said Lawson should receive the benefit of said value over said \$1,200; that said property was not set out or described in the inventory and schedule thereafter made by the assignor, nor any interest therein or equity in relation thereto, and said assignee has never in any wise interfered therewith; that various other items of property, consisting of interest in real estate and also certain personal property, were intentionally omitted from said inventory so made and filed with the county judge of Ulster county as required by law, such interest being a valuable interest in such real estate; that such sale to said Pinney and the assignment in reference thereto, above set forth, were communicated to the defendant Jacob L. DeWitt, before the signing and delivery of said general assignment; that the said assignor and assignee entered into certain agreements and arrangements as to said property as part of the scheme of such assignment, by virtue of which said assignor was to remain in possession of said assigned property, or a part thereof, and manage and control the same, and said Lawson did so manage and control said property and receive the income of a portion thereof after said assignment; that said assignment as well as said deed to Pinney was made by said Lawson with intent to hinder, delay and defraud the creditors of said Lawson and received by said DeWitt with full knowledge of said fraudulent intent on the part of said Lawson; that said assignment was fraudulent and void as against this plaintiff and the other creditors of said Lawson, and conveyed no title or interest in said property to said assignee, the defendant Jacob L. DeWitt; that the said conveyance to Pinney was fraudulent and void as a conveyance of said property, and is invalid and insufficient to convey any interest in said premises to said Pinney over and above the amount due him, and that he has no further interest in said premises so conveyed; that after the giving of said conveyances the said DeWitt filed his bond as general assignee of said Lawson, and the defendant Chauncey Stewart and Artemas Sahler became his sureties thereon, and the assignor filed a paper, purporting to be an inventory of his property, in Ulster county clerk's office on the 18th day of December, 1884, and thereafter proceeded to act as assignee with reference to a portion of the estate of said Lawson; that on the 25th day of June, 1885, the said DeWitt offered for sale at auction at the court house certain real estate of said assignor described in the inventory and schedules filed as aforesaid as follows (insert description); that all the said property was sold and conveyed by said assignee for the sum of \$350, subject to a mortgage for \$3,500, to defendant John S.

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Everett, although valued in said schedules at \$6,100 over and above said mortgage, and is in fact worth a very considerable sum over and above said mortgage, and the said \$350 is an utterly and entirely inadequate price for said property, and the same was unnecessarily sacrificed; that prior to such sale an action had been brought by the defendant Artemas Sahler against said Lawson and he had recovered a judgment therein for the sum of \$876.83, caused a levy to be made on the personal property of said Lawson included in said assignment, and had caused the sheriff of Ulster county to levy on some of said personal property and sell the same; and a portion of said real estate had been attached in said action; and said Jacob L. DeWitt had brought an action against said sheriff to recover the value of the property so levied upon and sold; that the defendant, the said sheriff, thereafter, and before said sale, served an answer in said action, setting out that said property was liable to execution, and that the said pretended assignment was made by said Lawson, and accepted by said DeWitt, with intent to hinder, delay and defraud creditors, and was, therefore, void; that at said sale notice of the pendency of said action and of said claim of the invalidity of said assignment was given by the attorneys for said Riseley, and the assignee was requested to delay the sale of said property, but refused to delay the same until after the hearing and determination of said action, and that no person was willing to bid off said property at a fair price by reason of said notice and the doubt as to the validity of the title to be acquired; that the defendant John S. Everett was present and heard said notice given, and bought said premises for much less than their full value, with full knowledge of the claim that said assignment was invalid, as so made by creditors, and that the property failed to bring a large price by reason of the doubts as to the validity of such assignment; that it was the duty of said assignee to delay said sale until said question of validity of said assignment was adjudicated in said action, and that by reason of such sale, the creditors of said Lawson suffered great loss; made as aforesaid, the said sale was null and void, and should be vacated, set aside and held for naught; that the conveyance of said premises from said Jacob L. DeWitt to said Everett is dated July 7, 1885, and recorded in Ulster county clerk's office, book of deeds No. 258, page 530; that thereafter, and at the April term, 1886, the said action brought by said Jacob L. DeWitt as aforesaid, against Joseph Riseley, sheriff, was tried on the merits before a jury, on the issue of the validity of said assignment from said Lawson to defendant DeWitt, and plaintiff's complaint dismissed on the merits, and said assignment held null and void and of no effect as to the said defendant; that thereafter, as plaintiff is informed and believes, the defendant Everett applied to the Ulster County Savings Institution, the holder of a mortgage for \$3,500 on the real property described in said inventory of said Lawson, for an assignment of the said mortgage, and procured the same in the name of his wife, the defendant Sarah C. Everett, for the purpose of protecting the said alleged sale to said Everett, and, as this plaintiff believes, for the purpose of foreclosing and to prevent the plaintiff and other judgment-creditors from realizing on

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their judgments against said Lawson, and this plaintiff tenders to said defendant Sarah C. Everett the amount due on said mortgage for principal and interest and insurance, and demands an assignment thereof as a judgment-creditor of said Lawson; that all the defendants except Jacob L. DeWitt, as assignee, Chauncey Stewart, John S. Everett and Sarah C. Everett, James E. Pinney and Mary Pinney are described in the inventory filed by Lucius Lawson as creditors of said Lawson, and are made defendants by reason of said interest, and no personal claim or demand is made against them, and the said Stewart is made defendant solely because he is surety for said assignee, and no personal claim is made against him; that a portion of the judgment recovered by Artemas Sahler, Abel A. Crosby, Grove Webster and Charles Reynolds, hereinbefore set forth against said Lawson, remains unpaid, as plaintiff is informed and believes, and that Artemas Sahler, on the 23d day of June, 1885, recovered in the Supreme Court two several judgments against said Lucius Lawson, one for the sum of \$347.84 damages and costs, and one for the sum of damages and costs \$433.35, which judgments were subsequently, by order of the Supreme Court, docketed in said county as of the 18th day of June, 1885; that on the 15th day of April, 1886, the defendant Jacob L. DeWitt obtained a judgment in the Supreme Court against Lucius Lawson, docketed in Ulster county clerk's office on that day, for the sum of \$176.38.

Wherefore, plaintiff demands judgment of this court:

First. That the pretended general assignment of Lucius Lawson to Jacob L. DeWitt, hereinbefore set forth, be declared null and void, and the same be set aside, canceled and held for naught, and the defendants Lawson and DeWitt be decreed to convey the real property therein described to a receiver to be appointed herein.

Second. That the deed from Lucius Lawson to James Pinney, hereinbefore set forth, be declared null and void as to any and all sums over that secured by the mortgage to Evangela Hayes, and that said Charles H. Pinney and Mary Pinney be decreed to convey said premises to a receiver to be appointed herein, subject to said mortgage.

Third. That the said sale made by the assignee to defendant John S. Everett, and the deed executed thereunder dated July 7, 1885, be vacated, annulled, set aside and canceled, and the said Everett and Sarah C., his wife, be decreed to convey the same to a receiver, and the said Everett be decreed to pay over to a receiver the rents and profits of the property received by him.

Fourth. That the said John S. Everett and all other persons be enjoined and restrained during the pendency of this action and perpetually thereafter from taking possession of any of the property described in the complaint, or from in any wise interfering with any property so described, or from assuming any control over the same, or exercising any act of ownership with reference thereto, or from collecting the rents or profits thereof, and particularly from taking possession of, or interfering with in any manner, any of said property not now in his possession, or occupied by him.

Fifth. That said Sarah C. Everett be enjoined and restrained

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from foreclosing said mortgage so obtained from the Ulster County Savings Institution, or causing the same to be foreclosed, until the final determination of this action, without notice to this plaintiff of such intention, and failure on the part of the plaintiff to take an assignment thereof and pay the amount due thereon; and that the said defendant be directed to assign the said mortgage to this plaintiff upon payment of said sum so due.

Sixth. That a receiver be appointed herein to collect the rents and profits of the premises herein described during the pendency of this action, and until the sale of such premises, and to make sale thereof under the judgment herein, and to receive and to pay over to this plaintiff and such other parties as may be entitled thereto, the moneys to be realized on the accounting of said John S. Everett and Jacob L. DeWitt.

Seventh. That a referee be appointed to take and state to the court the accounts of Jacob L. DeWitt, as assignee of said Lucius Lawson under the said assignment, and also to take account of and state the amount due the estate, or the amount due said Everett from said assignee, if anything, and to take proof as to the proper parties entitled to the proceeds of the moneys which may be realized from the assignor's estate.

Eighth. That plaintiff have such other and further relief as may be just and agreeable to equity, together with costs of this action.

V. B. VAN WAGONEN,
Plaintiff's Attorney.

Complaint by Creditor Under Chapter 740, Laws of 1894.

NEW YORK SUPREME COURT—COUNTY OF NEW YORK.

THE NATIONAL SHOE AND LEATHER
BANK OF THE CITY OF NEW YORK

asst.

AMELIA F. BAKER AND ROBERT M.
MERRITT.

147 N. Y. 581.

The plaintiff complains and respectfully shows to this court as follows:

1. The plaintiff is a domestic corporation organized under the laws of the United States, pursuant to an act known as "The National Bank Act," and doing business as a banking association at the city of New York, and that previous to the 24th day of November, 1894, one Frederick Baker had an account as depositor with the plaintiff.

2. The plaintiff further alleges, upon information and belief, that previous to the 1st day of January, 1891, the said Frederick Baker became and was indebted to the plaintiff in the sum of at least \$100, moneys received by him belonging to said plaintiff over and above the amount of any credits or set-offs to which he was entitled and which moneys the said Baker, acting in collusion with one Samuel

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C. Seely, a bookkeeper, in the employment of the plaintiff, had fraudulently obtained from the plaintiff and appropriated to his own use; and continued so indebted during all the times hereinafter mentioned.

3. That the said Frederick Baker, as the plaintiff is informed and believes, departed this life on the 24th day of November, 1894, being then insolvent; and leaving a last will and testament in and by which the defendant Amelia F. Baker was appointed executrix, and that no letters have been issued to the said Amelia F. Baker as executrix.

4. The plaintiff further alleges, upon information and belief, that with intent to hinder, delay and defraud his creditors, and among others this plaintiff, the said Frederick Baker, being insolvent and being largely indebted to the plaintiff, purchased three certain pieces or parcels of land in the city of New York, more particularly described as follows:

(Here insert description.)

and caused the title of said property to be taken in the name of the defendant Robert B. Merritt; that the consideration for the purchase of the said premises was paid by the said Frederick Baker and that no part of the same was paid by the said Robert B. Merritt, and that the said property was the property of the said Frederick Baker, and that at or about the time the said purchase was made the said Robert B. Merritt executed and delivered to the said Baker a conveyance thereof, with the name of the grantee in blank and with authority to insert the name of any person as grantee, and that the said Baker, with intent as aforesaid, did thereafter and on or about the 1st day of April, 1894, insert or cause to be inserted the name of the defendant Amelia F. Baker, as grantee in said conveyance, and that the same was thereupon recorded in the office of the register of the city and county of New York; and that the said Amelia F. Baker parted with no consideration for the said conveyance and that the said Frederick Baker caused the same to be made to her with intent to hinder and defraud his creditors, and among others this plaintiff.

5. That this action is brought for the benefit of the plaintiff and other creditors, if any, interested in the estate or property of said deceased.

Wherefore the plaintiff demands judgment that the conveyance of the premises hereinbefore described from the said defendant Merritt to the said Amelia F. Baker, be set aside and be declared null and void, and that a receiver be appointed of the said premises and of the rents and profits thereof and that the said Robert B. Merritt and Amelia F. Baker be required to convey the said premises to such receiver for the benefit of the plaintiff and of other creditors, and that the defendant be required to account for the said property and the proceeds thereof to the receiver, and that they be enjoined and restrained during the pendency of this action from interfering with the said property or from conveying, transferring or encumbering the same, and that the plaintiff have such other and further relief as may be just.

PUTNEY & BISHOP,

Attorneys for Plaintiff.

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A denial of fraud in an answer puts plaintiff upon proof of it, and entitles defendant to put in evidence all such facts as disprove it. *Van Alstyne v. Norton*, 1 Hun, 537. Although the affidavits upon which substituted service of summons is ordered be sufficient to give the court jurisdiction to make the order, they are not conclusive in a creditor's suit, and the defendant may impeach the judgment by showing that the defendant was a person against whom substituted service of summons could not be ordered as a non-resident. *Buswell v. Loucks*, 8 Daly, 518. Defendant may set up that plaintiff's judgment was fraudulently recovered. *Richardson v. Trimble*, 38 Hun, 409; S. C. 17 Abb. N. C. 210, citing *Manderville v. Reynolds*, 68 N. Y. 542. Defendant may show by answer that the judgment was recovered in violation of an equitable agreement. *Smith v. Cochran*, 2 Edw. 501. See to contrary, *Mathingly v. Nye*, 8 Wall. 370; Abb. Trial Ev. 741. An objection to the regularity of the judgment is not available as a defence. *Sandford v. Sinclair*, 8 Paige 373; *Platt v. Caldwell*, 9 Paige, 386; *Hone v. Woolsey*, 2 Edw. 289; *Barnard v. Darling*, 1 Barb. Ch. 218. Nor is an objection to the irregularity of the execution. *Green v. Burnham*, 3 Sandf. Ch. 110; *Williams v. Hogeboom*, 8 Paige, 469. Defendant need only answer as to property he had at time bill was filed. *Hope v. Brinckerhoff*, 4 Edw. 348; *Gregory v. Valentine*, 4 Edw. 282. It is no defence to a creditor's bill to reach the rights of a patentee or his assignee under a patent, that the invention is without novelty or utility. *Gillett v. Bate*, 86 N. Y. 87. It is no defence that there is property which the sheriff failed to discover and levy upon. *Mead v. Stratton*, 20 Week. Dig. 44.

SUB. 7. WHAT IS HELD TO BE PROOF OF FRAUDULENT INTENT.

Whether a voluntary deed be fraudulent as to creditors is a question of fact for a jury. *Bennett v. McGuire*, 5 Lans. 183. Fraud will not be presumed where an instrument admits of an opposite construction. *Bank of Silver Creek v. Talcott*, 22 Barb. 550. Fraudulent intent may be inferred from circumstances. *Stutson v. Brown*, 7 Cow. 732; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Currie v. Hart*, 2 Sandf. Ch. 353; *Bank of Orange Co. v. Fink*, 7 Paige, 87; *Tance v. Phillips*, 6 Hill, 433; *Hildreth v. Sands*, 14 Johns. 493; *Cook v. Smith*, 3 Sandf. Ch. 33; *Delaware v. Ensign*, 21 Barb. 85; *Wilson v. Ferguson*, 10 How. 175; *New-*

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man v. Cordell, 43 Barb. 448; *Pine v. Rickert*, 21 Barb. 469; *Briggs v. Mitchell*, 60 Barb. 288; *Waverly Bank v. Halsey*, 57 Barb. 249; *Solomon v. Moral*, 53 How. 342; *Blaut v. Gabler*, 77 N. Y. 461; *Van Wyck v. Seward*, 18 Wend. 375. A sale by one indebted, in consideration of supporting his family, is fraudulent and void as to creditors. *Jackson v. Parker*, 9 Cow. 73. If a person about to engage in a new business convey his property without consideration, it is void. *Case v. Phelps*, 39 N. Y. 164.

A conveyance with intent to defeat a recovery in a pending action is void. *Ford v. Johnston*, 7 Hun, 563; *Van Beuren v. Myers*, 18 Johns. 425; *Pendleton v. Hughes*, 65 Barb. 136. Where a debtor, for a nominal consideration, conveys his real estate to his wife and children, but remains in possession of the same without any apparent change of ownership, and continues in business, paying his past indebtedness by obtaining new credits and contracting new debts, until he fails in business, such conveyance is fraudulent as to subsequent creditors. *Savage v. Murphy*, 34 N. Y. 508. A conveyance of real estate by a man to a woman, in consideration of her marrying him, with knowledge on her part that his remaining property is insufficient to pay his debts, is void as to his creditors. *Kepp v. Kepp*, 7 Abb. N. C. 240. A sale for full value, made with intent to defraud creditors, passes no title to a purchaser who had knowledge of his vendor's fraudulent intent. *Racher v. Bovee*, 26 Hun, 554. A conveyance of personal property in consideration of the future support of the debtor, his wife and children, is void. *McLean v. Button*, 19 Barb. 450. A sale by an insolvent debtor to his wife, of a stock of goods upon a long credit, is fraudulent and void as against his creditors. *Browning v. Hart*, 6 Barb. 91; *Litchfield v. Pelton*, 6 Barb. 187. A transfer of goods in payment of a lawful debt is fraudulent at law, if made with intent to defraud another creditor and to deprive him of his ability to collect his claim, if the assignee have notice of the fraudulent intent. *Walsh v. Kelly*, 42 Barb. 98.

A transfer of all his property by a debtor, without consideration, in trust for his own use during life, and after his death for payment of his debts, is on its face fraudulent as to existing creditors, without reference to fraudulent intent. *Young v. Heermans*, 66 N. Y. 374. To render a voluntary conveyance fraudulent as to creditors, it is not necessary that the grantor be or be-

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lieve himself insolvent; it is enough that his solvency is contingent upon the fluctuations of the market. *Carpenter v. Roc*, 10 N. Y. 227; *Waterbury v. Sturtevant*, 18 Wend. 353. A voluntary conveyance is void as to creditors, although the grantee was not privy to the fraud. *Mohawk Bank v. Atwater*, 2 Paige, 54; *N. Y. & H. R. R. Co. v. Kyle*, 5 Bosw. 587; *Hildreth v. Sandt*, 2 Johns. Ch. 35. A voluntary conveyance by one largely indebted is void as to subsequent creditors. *Carpenter v. Muren*, 42 Barb. 300; *Mills v. Morris*, Hoff. Ch. 419. A valuable consideration will not sustain a conveyance tainted with actual fraud. *Goodhue v. Berrien*, 2 Sandf. Ch. 630. That the grantee was ignorant of the grantor's intent will not protect him if his own acts were fraudulent. *Hooker v. Mather*, 7 Cow. 301. Where the direct effect of a conveyance and of omitting to put it upon record is to defraud a creditor, who, relying upon the grantor's apparent ownership, intrusts him with the property which he misapplies, such conveyance is fraudulent as to creditors. *Pendleton v. Hughes*, 65 Barb. 136; s. c. 53 N. Y. 626. But it is only where a conveyance is made with intent to hinder, delay and defraud creditors, that it is void as to subsequent creditors, and one who gives credit to the grantor, knowing he has parted with his title, cannot claim it as fraudulent as to him. *Baker v. Gilman*, 52 Barb. 26. A voluntary conveyance, which the grantor was under no legal obligation to make, is void as to existing creditors. *Champlin v. Seeber*, 56 How. 46.

A fraudulent conveyance is void as against the creditors intended to be defrauded. *Stephens v. Sinclair*, 1 Hill, 143. A deed void for actual fraud will not be allowed to stand as security to the actual grantee. *Sands v. Codwise*, 4 Johns. 536. In *Van Wyck v. Baker*, 16 Hun, 168, it is held that where the grantee was not aware of the fraud, if the consideration was inadequate, a court of equity would treat it merely as security for the consideration actually paid. But a deed fraudulent as to creditors, will not be allowed to stand as security to a fraudulent grantee for the amount actually paid, citing *McArthur v. Hoysradt*, 11 Paige, 495; *Salomon v. Moral*, 53 How. 342, and cases cited. That the grantee has knowledge of fraudulent intent on part of grantor may be inferred from the circumstances. *Bigelow v. Timmerman*, 7 Wend. 436; *Bennett v. Maguire*, 58 Barb. 625; *Babcock v. Eckler*, 24 N. Y. 623. The lack of consideration raises

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a presumption of fraud on the part of the grantee. *Newman v. Cordell*, 43 Barb. 448; *Holmes v. Clark*, 48 Barb. 237; *Wood v. Hunt*, 38 Barb. 302, 4 Johns. Ch. 481. A conveyance with fraudulent intent is not protected by the existence of a valuable consideration. *Union Bank v. Warner*, 12 Hun, 306.

A subsequent purchaser may maintain a suit to set aside a prior invalid conveyance by his grantor. *McMahon v. Allen*, 35 N. Y. 403. A conveyance made with actual intent to defraud may be avoided by a subsequent creditor, but subsequent creditors are not entitled to the benefit of improvements made by the fraudulent grantee, or of incumbrances paid by him. *King v. Wilcox*, 11 Paige, 589. A conveyance, in consideration of an agreement to support the grantor and his wife, is fraudulent as to existing creditors. *Todd v. Monell*, 19 Hun, 362. A voluntary conveyance to a wife, without any valuable consideration, is fraudulent as to creditors, although the wife be ignorant of any fraudulent intent. *Smart v. Harring*, 52 How. 505. A conveyance to a wife of property paid for by her husband is valid as against all but existing creditors. *Zimmerman v. Schoenfeldt*, 3 Hun, 692; *Ocean Bank v. Hodges*, 9 Hun, 161. If a debtor purchase land and procure the deed therefor to be executed to his wife, it is void as to existing creditors. *Watson v. Le Roy*, 6 Barb. 481; *Mead v. Gregg*, 12 Barb. 653. If a husband makes a gift of money to his wife it is void as to existing debts, and also as to future creditors. *Partidge v. Stokes*, 44 How. 381. A conveyance by a husband to a wife of a larger amount of property than is sufficient to secure a debt owing to her separate estate is presumptively fraudulent as to creditors. *Briggs v. Mitchel*, 60 Barb. 288.

Moneys expended by a husband with fraudulent intent upon a house on his wife's land can be followed by his creditors; otherwise as to his personal services. *Isham v. Shafer*, 60 Barb. 317. An assignment to trustees in trust for the wife of the grantor, who continues in possession, is fraudulent as to a subsequent creditor whose debt is contracted during such continuance of possession. *Fiedler v. Day*, 2 Sandf. 594. But if a husband, without fraudulent intent and in good faith, who is not indebted, pay the purchase price of land and cause the same to be conveyed to his wife, her title is good as against subsequent creditors. *Tappan v. Butler*, 7 Bosw. 480; *Curtis v. Fox*, 47 N. Y. 299. This rule holds good as to persons who had dealt with the husband pre-

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viously, and gave him credit without knowledge of the transfer, where it was clear there was no fraudulent intent. *Carr v. Breese*, 81 N. Y. 584. See *Brockway v. Fleming*, 22 Week. Dig. 430, holding that an existing indebtedness alone does not render a conveyance fraudulent and void as against creditors, unless there is an intent to defraud, and this is especially the case where the balance of the property is sufficient to pay the debts of the grantor, on the authority of *Jackson v. Post*, 15 Wend. 588; *Phillips v. Wooster*, 36 N. Y. 412; *Bank of U. S. v. Housman*, 6 Paige, 526; *Dunlap v. Hawkins*, 59 N. Y. 342. A debtor conveyed, without consideration, certain real estate to a third person, with a view to having the title vested in his wife, to whom it was conveyed by such third person; the property remaining to the debtor was entirely insufficient to pay his debts. *Held*, that the evidence was sufficient to sustain a finding that the conveyance was made for the purpose of hindering, delaying and defrauding creditors. *Cole v. Tyler*, 65 N. Y. 73. A husband may convey directly to the wife, property which is the result of her earnings; such deed will be sustained in equity. *Mason v. Libbey*, 19 Hun, 119. The wife's release of her inchoate right of dower in her husband's lands is a good consideration for his promissory note in her favor, if there be no intent to defraud creditors; *Foster v. Foster*, 5 Hun, 557; *Swart v. Harring*, 14 Hun, 576; but as against creditors of an insolvent husband, only to the extent of the actual value of such inchoate right of dower as shown by the annuity tables. *Doty v. Baker*, 11 Hun, 222; *Swart v. Harring*, 14 Hun, 576, *supra*. A gift of money from a husband to a wife, which she immediately returns to him with instructions to use it as her agent, cannot be upheld. *Little v. Willetts*, 55 Barb. 125. A conveyance by a husband to his wife of personal property in trust conveys no title to the wife. *Van Arsdale v. Dixon*, Lalor, 358. A loan of money by a married woman to her husband, on his promise to repay it, constitutes a moral obligation which will uphold a payment to her while the husband is insolvent. *Woodworth v. Sweet*, 51 N. Y. 8; *McCartney v. Welch*, 44 Barb. 271; S. C. 51 N. Y. 626; *Jaycox v. Caldwell*, 51 N. Y. 395; *Lowry v. Smith*, 9 Hun, 514.

A voluntary settlement of a moderate sum by a husband on his wife, he retaining abundant means to pay his liabilities, cannot be invalidated by reason of his subsequent inability to pay a prior

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debt. *Babcock v. Eckler*, 24 N. Y. 623. A husband, not legally indebted, may make a moderate settlement on his wife. *Wilbur v. Fradenburgh*, 52 Barb. 474. In the absence of fraud, the fact that the intended husband, at the time of making an ante-nuptial contract, was largely in debt, does not invalidate it. *Starkey v. Kelly*, 50 N. Y. 676. Where a married woman purchases property, but the deed is made to her husband on his promise to pay on request, a subsequent conveyance of the legal title by him is not void as to his creditors. *Holden v. Burnham*, 2 Hun, 678. Where a solvent husband takes a conveyance in the name of his wife, the conveyance is not fraudulent as to future creditors. *Spicer v. Ayres*, 2 T. & C. 625; *Phoenix Bank v. Stafford*, 89 N. Y. 405; *Seaman v. Wall*, 54 How. 47. A conveyance by a husband of all his property to his wife and daughter on condition that the wife will discontinue a pending suit for a limited divorce, is fraudulent and void as to existing creditors. *Morgan v. Potter*, 17 Hun, 403. An ante-nuptial contract, that if the intended husband should occupy a portion of his wife's real estate after marriage, he would pay interest on a mortgage in lieu of rent, is not fraudulent as to his creditors. *Odell v. Mylins*, 53 How. 250. A naked gift from the husband to the wife will be sustained to the wife where creditors' rights are not affected. *Dewey v. Dunham*, 19 Week. Dig. 47. As to what constitutes such a valid gift, see *Armitage v. Mace*, 96 N. Y. 538.

An action cannot be maintained on behalf of the creditors of the husband against the wife of such debtor to recover the value of services rendered by him in carrying on the separate business of the wife, where such services were rendered without any express agreement on the part of the wife to pay therefor. *Lynn v. Smith*, 35 Hun, 275; *Abbey v. Deyo*, 44 N. Y. 343; *Foster v. Persch*, 68 N. Y. 400; *Sherman v. Elder*, 24 N. Y. 381; *Buckley v. Wells*, 33 N. Y. 518; *Gage v. Dauchy*, 34 N. Y. 293; *Draپر v. Stouvenel*, 35 N. Y. 507; *Bertles v. Nunan*, 92 N. Y. 152. See *Kingman v. Frank*, 33 Hun, 471. Where a husband owes his wife for money earned before her marriage, he has a right to secure it to her. *Harbottle v. Farrell*, 21 Week. Dig. 534. A conveyance of lands by a husband to a wife, held valid where they were purchased by the husband with the proceeds of other lands of which the wife was the equitable owner. *Smith v. Smith*, 17 Week. Dig. 81. Where property embraced in a chattel mort-

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gage is left in possession of a mortgagee, under an agreement that he may use it as before for the support of his family, it is fraudulent. *Marston v. Vulture*, 8 Bosw. 129. A chattel mortgage, void in part as being given to hinder, delay or defraud creditors, is void *in toto*. *Russell v. Winne*, 37 N. Y. 591; *Dodds v. Johnson*, 3 T. & C. 215. One who takes a chattel mortgage in good faith, upon sufficient consideration, is not affected by an undisclosed intent on the part of the mortgagor to defraud other creditors. *Smith v. Post*, 1 Hun, 516. The mere fact that an assignment of property was voluntary and without consideration is not sufficient to require a finding that it is fraudulent as to creditors. *Genesee, etc. Bank v. Mead*, 92 N. Y. 637. A gift *inter vivos*, without any intent to defraud creditors, cannot be questioned by a mere volunteer. *Duigan v. McCormack*, 53 How. 411.

A conveyance for a valuable consideration is not avoided by the statute, though incidental benefits are reserved to the grantor. *Shoemaker v. Hastings*, 61 How. 79. If the vendee purchases solely for the purpose of obtaining payment of an honest debt, his knowledge of a fraudulent intent on the part of the vendor will not avoid the sale as to creditors. *Norton v. Mallory*, 63 N. Y. 434; *Ocean Bank v. Hodges*, 9 Hun, 161; *Dudley v. Danforth*, 61 N. Y. 626; *Archer v. O'Brien*, 7 Hun, 146. A conveyance of land in payment of a *bona fide* debt is not fraudulent as to other creditors, although the debt is barred by the statute of limitations. *Hale v. Stewart*, 7 Hun, 591. To affect the title of a purchaser of chattels, he must have notice of his vendor's fraudulent intent prior to the perfecting of the sale. *Gothbery v. Connor*, 44 Super. Ct. 554. A voluntary conveyance is not fraudulent as to subsequent creditors, unless the grantor was then insolvent or the deed was made with intent to defraud subsequent creditors. *Holmes v. Clark*, 48 Barb. 237; *Tappen v. Butler*, 7 Bosw. 480; *Loeschigk v. Hatfield*, 5 Robt. 26; *Cushman v. Addison*, 52 N. Y. 628. The fact of an existing indebtedness is not sufficient to render a conveyance void as to prior creditors; there must be a fraudulent intent. *Vaneyck v. Seward*, 6 Paige, 62; s. c. 18 Wend. 375; *Dunlap v. Hawkins*, 59 N. Y. 342. See *Babcock v. Eckler*, 24 N. Y. 628. A soldier's bounty money, being exempt by law, a gift of it to his wife is not a fraud upon creditors. *Youmans v. Boomhower*, 3 T. & C. 21. An absolute conveyance,

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intended merely as a security, is not fraudulent *per se*. *Bigney v. Tallmadge*, 17 How. 556.

Including interest not collectible at law, but which is equitably due, does not render a mortgage fraudulent as to creditors. *Spencer v. Ayrault*, 10 N. Y. 202. An insolvent debtor may lawfully prefer one creditor to another by a conveyance of property to secure him. *Bishop v. Halsey*, 13 How. 134; *Powers v. Graydon*, 10 Bosw. 630; *McMenomy v. Roosevelt*, 3 Johns. Ch. 446; *Carpenter v. Muren*, 42 Barb. 300; *Bedell v. Chase*, 34 N. Y. 386. The mere sale of goods by a person in failing circumstances upon credit, to one who has a knowledge of his condition, is not a fraud in law. *Loeschigk v. Bridge*, 42 N. Y. 421. The sale by an insolvent firm of all its effects, at a fair valuation, to a responsible vendee, who has knowledge of the vendor's insolvency, is not fraudulent *per se*. *Ruhl v. Phillips*, 48 N. Y. 125, reversing 2 Daly, 45. But where a person takes a conveyance from a known insolvent, without agreeing to pay his debts, he can obtain no rights by subsequent voluntary payment. *Wood v. Hunt*, 38 Barb. 302. Where the purchase-money of land is paid by one and the conveyance made to another, the conveyance made is not fraudulent as to creditors if the consideration were paid in discharge of a prior moral obligation. *Wait v. Day*, 4 Den. 439. A creditor of the vendor, seeking to avoid a sale on the ground of fraud, must give the ground of fraud to establish the fraudulent intent; mere suspicion is not enough, nor is the vendor's fraudulent intent sufficient; the vendee must also be implicated, and by other proof than mere inadequacy of price. *Jaeger v. Kelley*, 52 N. Y. 274. A fraudulent conveyance is binding on the grantor and his heirs, and the heir cannot impeach the ancestor's deed on the ground that it is fraudulent. *Sander v. Cadwell*, 1 Cow. 622; *Cadwell v. King*, 4 Cow. 207; *Malin v. Garnsey*, 16 Johns. 189; *Wood v. Hunt*, 38 Barb. 302; *Waterbury v. Westervelt*, 9 N. Y. 598; *Moseley v. Moseley*, 15 N. Y. 334. A conveyance by a fraudulent grantee to a *bona fide* purchaser, for a valuable consideration, without notice, will prevail against the creditors of the original fraudulent grantor. *Anderson v. Roberts*, 18 Johns. 515; *Hawley v. Cramer*, 4 Cow. 132; *Reynolds v. Park*, 5 Lans. 149.

If the vendee purchase solely for the purpose of obtaining payment of an honest debt, his knowledge of a fraudulent intent on

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the part of the vendor will not avoid the sale as to creditors. *Dudley v. Danforth*, 61 N. Y. 626; *Hale v. Stewart*, 7 Hun, 591; *Shoemaker v. Hastings*, 61 How. 79. A conveyance by one indebted in pursuance of a parol trust, created upon a valuable consideration, is not fraudulent as against the creditors of the grantor. *Norton v. Mallory*, 63 N. Y. 434. A voluntary conveyance of property of large value, executed by needy parents in extreme old age to their sons, in whom they confided, and in ignorance and misapprehension of its contents and effect, set aside, although it was not found by the court, as a matter of fact, to have been induced by actual positive fraud. *Weller v. Weller*, 44 Hun, 172. The payment by the purchaser of a fair consideration upon the sale of property, affords strong evidence of good faith, and while not conclusive upon that question, requires clear evidence of the existence of a fraudulent intent to overcome the presumption of honest motives arising from that fact. *Nugent v. Jacobs*, 103 N. Y. 125. But no form in which the transaction is put can shield the property transferred, from the claim of creditors, and proof that a mortgage was given by an insolvent debtor to secure an honest debt does not, as matter of law, disprove the fraudulent intent on the part of the debtor. *Billings v. Russell*, 101 N. Y. 226, reversing 31 Hun, 65. A purchaser for a valuable consideration is not chargeable with constructive notice that the conveyance to him, by his vendor, was made with intent to defraud creditors; his title can only be affected by actual notice of such fraudulent intent. *Farley v. Carpenter*, 37 Hun, 359; *Stearns v. Gage*, 79 N. Y. 102; *Parker v. Connor*, 93 N. Y. 118.

A conveyance procured to be made to a wife through a third person, in fraud of the husband's creditors, to which the wife is a party, is absolutely void; it will not be permitted to stand as security for any purpose of indemnity or reimbursement. *Davis v. Leopold*, 87 N. Y. 620. Where a fraudulent grantee has, at the instance of the grantor, executed a mortgage to pay debts of the latter, the equity of the mortgagee will prevail over the rights of a receiver in supplementary proceedings, if the creditors were ignorant of the debtor's financial condition. *Murphy v. Moore*, 23 Hun, 95, 89 N. Y. 446. A fraudulent conveyance is valid except as to creditors. *Bicknell v. Lancaster City Fire Ins. Co.*, 1 T. & C. 215, affirmed, 58 N. Y. 677. No action can be maintained by the fraudulent grantor to recover the property conveyed,

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although the conveyance was made by the advice of the grantee in whom the grantor had great confidence. *Renfrew v. McDonald*, 11 Hun, 254. Subsequent illegal acts of an assignor will not render invalid an assignment made with honest intent. *Shultz v. Hoagland*, 85 N. Y. 464. Where it appeared that at the commencement of their dealings with a firm, creditors made no search of the records as to the title, and that such search would have shown that the firm did not own the property, conveyance will not be set aside. *Trenton Bank Co. v. Duncan*, 86 N. Y. 221. Where a debtor transferred property to his creditor, not only to pay the debt due, but for the purpose of preventing his other creditors from reaching it, *held*, that the creditor should be required to pay over all the property brought in excess of his claim. *Palen v. Bushnell*, 1 Hun, 319.

A transfer for the purpose of hindering, delaying or defrauding other creditors will not give a good title as against the sheriff even though there may have been an indebtedness to the transferee and a payment of money by him on account of the purchase. *Cohen v. Kelly*, 35 Super. Ct. 42. A person who, with fraudulent intent, takes a conveyance from a debtor to hinder the creditors of the latter, does it at the peril of having that which he receives taken from him by the creditor whom he is attempting to defraud, without any remedy to recover that which he parts with in carrying out his bargain. *Union National Bank of Albany v. Warner*, 12 Hun, 306. One who, in good faith and for an honest purpose, receives a conveyance which proves to have been made with intent to defraud, is only bound to restore to the grantor's creditors what he has received. *Pond v. Comstock*, 20 Hun, 492; *Murphy v. Moore*, 23 Hun, 95. A voluntary conveyance by one who is not indebted can afterward be availed by creditors only by showing that it was given with a view to continuing in business and creating future debts and saving the property from them for the purpose of defrauding future creditors. *Teed v. Valentine*, 65 N. Y. 471. It is only where made in good faith and with no intent to defraud creditors that a voluntary conveyance will be upheld by proof that the grantor retained ample estate to pay all his debts. *Fox v. Moyer*, 54 N. Y. 125. An assignment of property in fraud of creditors is void by statute, both as to existing and subsequent creditors. *Dewey v. Moyer*, 72 N. Y. 70, affirmed, U. S. Supreme Court, 23 Alb. L. J. 295. In an executor's action

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to reach moneys of the testator, which defendant claims as a gift, it is competent for plaintiff to show, under chapter 314, Laws 1858, in avoidance of the defeasance, that such alleged gift was in fraud of his individual rights as a creditor of the testator. *Jones v. Jones*, 41 Hun, 163. The fact of payment of a valuable consideration upon a transfer of property is not inconsistent with the existence of an intent to defraud, and no difference can be made between the consideration produced by an existing debt or one arising in any other manner; proof, therefore, that a mortgage given by an insolvent debtor was given to secure a debt actually owing by the mortgagor does not, as a matter of law, disprove the existence of a fraudulent intent on the part of the debtor. *Billings v. Billings*, 101 N. Y. 226. The title of a purchaser in good faith acquired through the purchase at a foreclosure of a chattel mortgage, is not affected by the fact that the mortgage was executed to hinder, delay and defraud creditors. *Zoeller v. Riley*, 100 N. Y. 102. A conveyance of lands by a debtor for a nominal consideration, although presumptively fraudulent, will be sustained where it appears that he held the lands in trust, and that the lands were conveyed in pursuance of such trust. *Bachs v. Tomlinson*, 1 St. Rep. 484. It must appear, in order to recover in a creditor's suit, that the conveyances challenged as fraudulent are so in fact, and stand in the way of the collection of the plaintiff's judgment; *Carpenter v. Osborn*, 102 N. Y. 552; fraudulent intent must be proved as a matter of fact. *Emmerick v. Heffernan*, 53 Super. Ct. 98. The mere fact that a man executes a mortgage for an usurious loan does not make the transaction fraudulent, nor does it necessarily give a creditor the right to intervene to set aside the security. *Marx v. Tailer*, 12 Civ. Pro. R. 226.

Where in a creditor's suit it appeared that the conveyance was for a good consideration, there was no fraud or facts from which a fraudulent intent could be inferred, and the court refused to grant a non-suit, but, finding the consideration paid inadequate, permitted the conveyance to stand as security for the amount actually paid, *held*, error; that even if the consideration paid was inadequate, it was sufficient to sustain defendant's title; and, there being no fraud shown, defendant was entitled to a nonsuit, and the relief granted by the court could only be given in a proper action, where the evidence was consistent with the

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complaint. *Truesdell v. Sarles*, 104 N. Y. 164. A sale of goods which is not found to be fraudulent as to creditors is not to be treated as a security, with a view to an accounting by the buyer. *Van Wyck v. Baker*, 16 Hun, 169; *Leet v. McMaster*, 51 Barb. 236; *Manning v. Ennis*, 21 Week. Dig. 27. The circumstances that real property was transferred by a debtor for less than half its value, and the grantor was to be allowed to reside on the premises, *held* to uphold a finding of a fraudulent intent. *Coddington v. Vanderender*, 19 Week. Dig. 126. In an action in the nature of a creditor's bill, it appeared a father had conveyed the property to his son on the latter's agreement to support his parents and pay certain debts. *Held*, the agreement to support the parents did not raise a necessary presumption of fraudulent intent. *Vial v. Mathewson*, 34 Hun, 70. If the guilt of a transferee in fraud of the transferor's creditors is constructive only, arising from the legal presumption that he intended the consequence of his acts, money paid by him in redemption of pre-existing incumbrances may be allowed him. *Lore v. Dierkes*, 16 Abb. N. C. 47. So long as it does not appear that the property has been disposed fraudulently, or at an unconscionable valuation, creditors have no right to disturb a conveyance or have the same declared a mortgage. *Peterkin v. Costello*, 18 Week. Dig. 186. A mortgage given to secure a previously existing valid indebtedness is valid, as against other creditors, although made and received with intent to place the mortgagor's property beyond the reach of such other creditors, and at the same time secure him the use thereof. *Billings v. Billings*, 31 Hun, 65. A conveyance, by a solvent debtor, of a portion of his property to trustees to pay a portion of his creditors is not, as a matter of law, fraudulent and void as to those not provided for, merely because it contains a provision that the surplus is to be repaid to the grantor, although such a conveyance by an insolvent debtor would be. *Knapp v. McGowan*, 96 N. Y. 75. To maintain a creditor's bill it is not necessary that the judgment should have existed prior to the alleged fraudulent conveyances; it is sufficient if the claims existed at the time of the conveyance. *National Bank of Rondout v. Dreyfus*, 14 Week. Dig. 160, affirmed 96 N. Y. 676. A mortgage by a husband to his wife, made in consideration of a previous existing loan on which he had promised to give her security, is not fraudulent merely because it was intended by both to prevent some

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other creditor from collecting his debt out of the mortgaged property. *Jewett v. Noteware*, 30 Hun, 192. Assignments of property, by a father to a son in settlement of services, *held* not fraudulent against creditors, although the son was a minor when the services were rendered. *Canavan v. McAndrew*, 14 Week. Dig. 282. If a finding of fact is made that an instrument is not fraudulent, when it is fraudulent as matter of law, the finding of fact does not avail. *Coleman v. Burr*, 93 N. Y. 17. The execution of a bill of sale of personal property, on the express understanding that as a condition precedent to its having effect the purchaser shall execute a written agreement to allow the seller to remain in possession, passes no title as against one having a valid judgment and execution against the seller. *Fowler v. Haynes*, 91 N. Y. 346. That inadequacy of consideration is alone insufficient to set aside a conveyance as fraudulent, see *Truesdell v. Davies*, 104 N. Y. 164.

An action by creditors of the husband to reach lands conveyed to the debtor's wife was sustained upon finding that the husband was insolvent at the time and that the transfer was a device to defeat creditors. *Milwaukee Harvester Co. v. Cuker*, 89 Hun, 598, 35 Supp. 289.

Where a debtor conveyed to his wife, for a consideration of twenty-five per cent of its value, property which deprived him of ability to pay his indebtedness to plaintiff, it was held that an inference of fraudulent intent in disposing of the property was warranted and the conveyance set aside. *Sandman v. Seaman*, 84 Hun, 337, 65 St. Rep. 602, 32 Supp. 338.

If a general assignment is made by an assignor with intent to hinder, delay or defraud creditors, it is invalid as against creditors no matter how free from knowledge or participation in the fraud the assignee may be. *Loos v. Wilkinson*, 110 N. Y. 195. This is based upon the ground that an assignee under general assignment is not a purchaser for value. *Putnam v. Hubbell*, 42 N. Y. 106; *Cuyler v. McCartney*, 40 N. Y. 221.

An effort by an assignee to compromise with his creditors after an assignment is not evidence of fraudulent intent in making the assignment. *Van Bergen v. Lehmaier*, 72 Hun, 304. That an assignment is made with intent to prevent the assignor's creditors from gaining a preference by execution does not establish a fraudulent purpose. *Welles v. March*, 30 N. Y. 344; *Reed v. McIntyre*, 98 U. S. 507.

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Where the acts of the assignor are so connected that they form a scheme for the disposition of the property of the debtor to defraud his creditors, then all such acts are to be taken together, and where an assignment is a culmination of the whole scheme, fraud in the acts leading up to it will vitiate the assignment. *Hardt v. Schwab*, 72 Hun, 109; *Haydock v. Coope*, 53 N. Y. 68; *Rothchild v. Solomon*, 52 Hun, 486; *Loos v. Wilkinson*, 110 N. Y. 195. See, however, on this point *Abceg v. Bishop*, 142 N. Y. 286; *Central National Bank v. Seligman*, 138 N. Y. 441; *Berger v. Varrelmann*, 127 N. Y. 281; *Spelman v. Friedman*, 130 N. Y. 421. Intentional withholding of property by the assignor from the assignee is a fraud on the rights of creditors. *White v. Benjamin*, 3 Misc. 490; *Chambers v. Smith*, 60 Hun, 248; *Schwab v. Kaugharan*, 42 St. Rep. 407; *Smith v. Perine*, 121 N. Y. 376; *Coursey v. Morton*, 132 N. Y. 556.

So as to an intentional omission of property from the schedule. *Pittsfield National Bank v. Tailer*, 60 Hun, 130. But this is not the rule where the property has no value. *Shultz v. Hoagland*, 85 N. Y. 464. The latter case holds that subsequent acts of the assignee unconnected with the assignment are held immaterial, and to the same effect is *Roberts v. Buckley*, 80 Hun, 58.

SUB. 8. DISCOVERY AND MISCELLANEOUS MATTERS OF PRACTICE.

§ 1878.

§ 1878. How discovery may be compelled.

A discovery may be compelled in an action, brought as prescribed in this article, by directing the person, required to make it, to appear before the court, or a referee appointed by it, and to be examined under oath, concerning the matters pertaining to the discovery. But this section does not affect the right of the plaintiff to cause the deposition of a defendant to be taken, as prescribed in article first of title third of chapter ninth of this act.

Proceedings supplementary to an execution are not a necessary preliminary to a judgment-creditor's action. *Pope v. Colc*, 55 N. Y. 124. Where different actions have been brought by creditors for themselves and the other creditors, against an assignee for the benefit of creditors, for an accounting and closing of the trust, the court has power to compel creditors and claimants to come in and prove their claims in the suit brought or interlocutory judgment first obtained, and to stay proceedings in the other actions. *Travis v. Myers*, 67 N. Y. 542. The plaintiff, pending the action, and without waiving or abandoning the lien of his

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judgment, may proceed to sell the debtor's lands on execution under his judgment; having done so, he may still proceed with the creditor's action to obtain a judgment removing the cloud upon title. *Erickson v. Quinn*, 15 Abb. Pr. (N. S.) 166; memorandum, 50 N. Y. 697. A creditor cannot maintain an action in aid of his execution without showing fraud, collusion or combination obstructing the ordinary process of the law; mere questions as to priority of lien as between himself and other claimants will not suffice. *Skinner v. Stewart*, 15 Abb. 391. See *Shaw v. Dwight*, 27 N. Y. 244. A creditor's suit may be maintained while supplementary proceedings are pending. *Taylor v. Persee*, 15 How. 417; *Gere v. Dibble*, 17 How. 31. A judgment-creditor, after instituting supplementary proceedings, and before the appointment of a receiver, may bring a creditor's action to set aside an assignment. *Bennett v. McGuire*, 5 Lans. 183. The creditor's action does not relate back to supplementary proceedings so as to recover moneys paid over by a third party to the judgment-debtor. *Edmonston v. McLoud*, 16 N. Y. 543.

In an equitable action to reach a specific fund of a debtor in the hands of other defendants, no relief being demanded against the debtor, the court should not grant a personal judgment against the debtor. *Kelly v. Downing*, 42 N. Y. 71. It is said an action must be brought within six years after return of execution unsatisfied, to set aside a fraudulent conveyance; *Eyre v. Beebe*, 28 How. 333; but in *Tafft v. Wright*, 2 T. & C. 614, affirmed, 59 N. Y. 656, the ten years' statute is held to apply. See, also, *Hubbell v. Newbury*, 53 N. Y. 98. A right of action to set aside an assignment is not waived by delay so long as the assignee has in his hands moneys belonging to the trust. *Knauth v. Bassett*, 34 Barb. 31. The plaintiff in a creditor's action may obtain an injunction to restrain the defendant from disposing of the property; *Candler v. Petit*, 1 Paige, 168; *Bloodgood v. Clark*, 4 Paige, 574; but such an injunction will prevent another judgment-creditor from levying on the property. *Lansing v. Easton*, 7 Paige, 364. One who claims a beneficial interest under an assignment cannot have relief on the ground that it is fraudulent. *Ontario Bank v. Root*, 3 Paige, 478. A judgment-creditor cannot maintain an action to set aside an assignment by his debtor, where such assignment was made before the cause of action accrued, upon which he obtained his judgment. *Phillips v. Wooster*, 36

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N. Y. 412. One who sues for himself and all others may discontinue before judgment. *Tremain v. Guardian, etc. Co.* 11 Hun, 286. Until an order for judgment in a suit brought for all, in which they can come in, there is nothing to prevent a suit on each separate judgment for similar relief. *O'Brien v. Browning*, 49 How. 109. Where an order for an accounting is made under which all creditors may come in, it operates as an interlocutory judgment in favor of each creditor, whether he comes in or not, as effectually as if he had been named as a party after such judgment; no creditor will be allowed to bring or proceed with a separate suit to judgment. Creditors who do not come in are barred after the usual notice to creditors has been published, though they have had no actual knowledge of the proceedings. *Kerr v. Blodget*, 48 N. Y. 62.

A judgment-creditor who has been defeated in his own suit, cannot come into an action brought for all and be made plaintiff. *O'Brien v. Browning*, 11 Hun, 179; appeal dismissed, 77 N. Y. 630. A suit to avoid a mortgage as fraudulent, as against creditors, will not be defeated by its foreclosure and sale thereunder pending the action. *Smith v. Shaul*, 21 Week. Dig. 91. In an action to set aside a general assignment on the ground of fraud, the plaintiff may attack any other instrument which may have been executed by the fraudulent debtor in order to withdraw his property from the claims of creditors. *Chandler v. Powers*, 9 St. Rep. 169.

A judgment-creditor of a wife whose debt was contracted prior to the granting of a divorce, can reach no portion of the alimony awarded to her by such decree. *Andrews v. Whitney*, 82 Hun, 117, 63 St. Rep. 486, 31 Supp. 164; *Romaine v. Chauncey*, 129 N. Y. 566. A creditor's action, brought in behalf of himself and of others who may come in and contribute to the expenses thereon, cannot be discontinued by the entry of an interlocutory decree settling the rights and liabilities of the parties. *Salisbury v. Binghamton Pub. Co.* 85 Hun, 99, 32 N. Y. Supp. 652, 66 St. Rep. 35.

As to inspection of debtor's books, see *Manley v. Bonnel*, 11 Abb. N. C. 123; *Kelly v. Eckford*, 5 Paige, 548; *Duff v. Hutchinson*, 19 Week. Dig. 20; *Stebbins v. Harmon*, 17 Hun, 445; *Bundschur v. Simon*, 23 Supp. 714. Where fraudulent transactions are separately set forth in a creditor's bill as distinct causes of action

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and the judgment is reversed only in part, new trial may be confined to the issues as to which the reversal was had. *Schlitz Brewing Co. v. Ester*, 86 Hun, 22, 33 Supp. 143, 66 St. Rep. 769. The validity of a contract on which the original action was brought, resulting in a judgment which is the basis of the creditor's suit, cannot be inquired into in such resulting action. *Decker v. Decker*, 108 N. Y. 128.

ARTICLE II.

WHAT PROPERTY MAY BE REACHED BY CREDITOR'S BILL, AND HOW APPLIED. §§ 1873, 1874, 1875, 1879.

§ 1873. What property may be reached.

The final judgment in the action must direct and provide for the satisfaction of the sum due to the plaintiff, out of any money, thing in action, or other personal property, belonging to, or due to the judgment debtor, or held in trust for him, which is discovered in the action; whether the same might or might not have been originally taken by virtue of an execution.

§ 1874. Interest of judgment debtor in land contract may be reached.

The final judgment in the action must also direct and provide for the satisfaction of the sum due to the plaintiff, out of the interest, if any, of the judgment debtor, in a contract for the purchase of real property by him; either by selling the interest, or by transferring it to the judgment creditor, in such a manner and upon such terms, as the court deems most conducive to the interests of the parties. Where the person, bound to perform the contract to the judgment debtor, is a defendant in the action, the final judgment may direct a specific performance of the contract to the judgment creditor, or, where the interest in the contract is directed to be sold, to the purchaser.

§ 1875. Id.; how applied.

In a case specified in the last section, the value of the interest of the judgment debtor holding the contract must be ascertained, under the direction of the court; and so much thereof as is necessary must be applied to the payment of the sum due to the plaintiff, and the residue, if any, to the benefit of the judgment debtor.

§ 1879. Application of this article; what property cannot be reached.

This article does not apply to a case, where a judgment debtor is a corporation, created by or under the laws of the state. Nor does it authorize the discovery or seizure of, or other interference with, any property, which is expressly exempted by law from levy and sale, by virtue of an execution; or any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days next before the commencement of the action, where it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor.

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In creditors' suits there must be something so specific that, as to it, either in law or equity, the plaintiff's judgment or execution, or the filing of the bill, or the appointment of the receiver, will create a lien or make a title. *Ogden v. Wood*, 51 How. 375; *Hoolcy v. Gicce*, 9 Abb. N. C. 8; s. c. 82 N. Y. 625. A judgment-creditor gets no specific lien until he files his bill. *Beck v. Burdett*, 1 Paige, 305; *Edmeston v. Lynde*, 1 Paige, 637; *Corning v. White*, 2 Paige, 567; *Scouton v. Bender*, 3 How. 185; *Roberts v. Albany, etc. R. R. Co.* 25 Barb. 662. The lien does not relate back. *Ballou v. Boland*, 14 Hun, 355; *Edmonston v. McLoud*, 16 N. Y. 543. It is held that service of process must be made before it takes priority. *Fitch v. Smith*, 10 Paige, 9; *Boynton v. Rawson*, Clarke, 584; *Safford v. Douglas*, 4 Edw. 537. A judgment-creditor, by his suit, obtains a lien on the choses in action, money, stock and equitable interests of the debtor. *Lynch v. Utica Ins. Co.* 18 Wend. 236; *Hadden v. Davis*, 20 Johns. 554; *Jeffries v. Cochran*, 47 Barb. 557; *Brown v. Nichols*, 42 N. Y. 26. Until a receiver is appointed, however, a judgment-creditor obtains no lien on personal property, such as to prevent a levy and sale on execution by a junior creditor. *Davenport v. Kelly*, 42 N. Y. 193. It seems that a receiver, appointed in supplementary proceedings, acquires, from the commencement of a creditor's action by him, a lien upon the equitable estate of the debtor in the lands in suit. *Storm v. Waddell*, 2 Sandf. Ch. 494; *Kennedy v. McGuire*, 15 Hun, 70. The lien does not attach to the personal property which may be levied upon. *Albany City Bank v. Schemerhorn*, Clarke, 297. The lien is said to attach on appointment of a receiver and his filing security. *Mann v. Pentz*, 2 Sandf. Ch. 257; *Wilson v. Allen*, 6 Barb. 542.

A receiver appointed in supplementary proceedings who brings an action to set aside a fraudulent conveyance, can obtain a decree setting aside the transfer only so far as it is necessary to satisfy the judgment upon which he was appointed, with the costs of the action. *Bostwick v. Menck*, 40 N. Y. 383; *Verplanck v. Van Buren*, 76 N. Y. 247.

Where there are several judgments against a debtor who has fraudulently conveyed his real estate, and one creditor prosecutes a suit in which others do not join and contribute to the expense, and the conveyance is declared void as against creditors, the receiver appointed in such a case is entitled to priority in the sur-

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plus, on the foreclosure of a prior mortgage over the judgment-creditors. *Warden v. Browning*, 12 Hun, 497. Under a decree to come in and pass their accounts, it is a matter of course to permit a creditor to come in and prove his debt at any time before the fund is actually distributed and paid out, upon his showing a sufficient excuse for not coming in before the master, and paying costs caused by the delay. Where an action was brought to obtain a distribution under a general assignment, and a referee was appointed, and the usual steps taken, *held*, that in the absence of fraud all the creditors of the assignor were bound by the decree, whether they had notice of the suit or not. *Kerr v. Blodgett*, 48 N. Y. 62. The debts, choses in action and other equitable assets of the judgment-debtor may be assigned or sold under the decree of this court, so as to vest an equitable interest in the purchaser. Every species of property belonging to a debtor may be reached and applied to the payment of his debts, and the powers of the court are adequate to that purpose. *Edmeston v. Lynde*, 1 Paige, 641.

A referee should be appointed to make sale of the property with a provision that the debtor unite in the conveyance or a receiver should be appointed and the debtor directed to assign to him. *Dawley v. Brown*, 65 Barb. 120. In *Chautauqua County Bank v. White*, 6 N. Y. 236, it was held the proper practice to order the lands sold by a receiver and the proceeds applied in satisfaction of the judgment, and the purchaser at the sale acquires all the title and interest which the debtor had in the lands at the time of his conveyance to the receiver, or the fraudulent conveyance may be annulled and the creditor permitted to proceed to a sale on his execution. See cases cited, opinion of Gardner, J., page 252; opinion by Gridley, J., page 255. As to the title obtained by sale by a receiver appointed by the court on decree in a judgment-creditor's bill, see *Chautauqua County Bank v. Riseley*, 19 N. Y. 369. Judgment-creditors, suing for equitable relief cannot have personal judgment for the debt against the debtor enforceable by execution. *Claffin v. Maguire*, 45 Super. Ct. 521. A direction in a judgment setting aside an assignment, as against creditors, which gives the plaintiff in the suit priority over other creditors, is proper so far as it affects the assignor, but prior creditors cannot be thus deprived of their liens. *Claffin v. Smith*, 21 Week. Dig. 212. A judgment-creditor

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has no title to the lands of his debtor, but only a lien thereon which may, by subsequent proceedings, become the foundation of title, nor has he an interest in an action brought by another judgment-debtor. He will not be concluded, by a denial of his application, from coming in as a party to the action by another judgment-creditor, and his rights and remedies remain as before. Judgments are liens in the order of docketing, and a creditor may have a judgment simply setting aside the conveyance, or the court may compel the fraudulent grantee to convey to a receiver, to be sold to satisfy plaintiff's judgment. The result of the sale, in either case, will not affect the liens of prior judgments. *White's Bank of Buffalo v. Farthing*, 101 N. Y. 344. Where a judgment-creditor brings a creditor's bill on behalf of himself and others similarly situated, only such creditors as were at the time the action was commenced in the same situation with the plaintiff, that is, having judgments and unsatisfied executions, are entitled to share with him in the proceeds, and plaintiff is entitled to priority as against general creditors who subsequently recover judgments. *Claffin v. Gordon*, 39 Hun, 54. In 101 N. Y. 344, *supra*, it is held that the judgment may simply set aside the conveyance, or compel the grantee to convey the lands to a receiver, to be sold to satisfy plaintiff's judgment. In the latter case, the purchaser takes subject to the lien of prior judgments, as of the date of the conveyance to the receiver. Where a judgment in a creditor's suit declares a transfer to be void and directs the parties to account, it is proper, after such accounting has been had, to enter a supplementary judgment at the foot of the first judgment, directing the defendants to turn over the property mentioned or its value. *James Gould Co. v. Mahedy*, 38 Hun, 294. Judgment cannot be taken for damages alone. *Sage v. Mosher*, 28 Barb. 287.

Where an action is brought by a judgment-creditor on behalf of all other judgment-creditors as well as himself, to set aside fraudulent conveyances, a judgment is not improper directing the appointment of a receiver to take a conveyance of, and to sell the real estate. Where, in such an action, the holder of a lien or other interest is made a party defendant, and the validity of the lien or claim is made an issue in the action, and is disposed of adversely to such defendant, a sale and conveyance by such receiver will vest in his grantee a title superior to such lien or claim. *Shand v. Handley*, 71 N. Y. 319; *Clift v. Moses*, 75 Hun,

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517, 57 St. Rep. 347. The property may be sold on execution by the sheriff, and where it does not appear there are other creditors, the judgment should declare the conveyance void as to plaintiff only. *Kennedy v. Barandon*, 67 Barb. 209; *Union Bank v. Warner*, 12 Hun, 306. But it is said in *Van Wyck v. Baker*, 10 Hun, 39, that a judgment directing the sheriff to sell is erroneous, and that execution should issue, and sale be had thereunder, or by a receiver. In an action to set aside as fraudulent a sale of both real and personal property, the personal property should be first subjected to the payment of plaintiff's claim. *Trooman v. Clow*, 25 Week. Dig. 139.

In a suit to reach a debtor's interest in his deceased father's estate the proper decree is for a receiver of the property, equitable assets and choses in action, including interest in the father's estate, and to order defendants to assign to the receiver. *McArthur v. Hoysradt*, 11 Paige, 495. A creditor may have any relief the facts show him entitled to, though not specifically asked for, if certain and within the proceedings. *Donovan v. Sheridan*, 39 Super. Ct. 256. The court may compel a debtor to convey land situated in another State. *Bailey v. Rider*, 10 N. Y. 363. Where it appears the conveyance was for a valuable consideration, but with fraudulent intent, plaintiff cannot have it set aside as fraudulent, but can have a judgment of sale, and for payment from proceeds. *Orr v. Gilmore*, 7 Lans. 345. Where no relief is demanded against the debtor, and he has not answered, a personal judgment cannot be taken against him. *Kelly v. Downing*, 42 N. Y. 71.

Where the property in the hands of trustees under an invalid trust consists of personal property, which originally belonged to the grantor, and by the terms of the conveyance he is entitled to his support therefrom, the income may be reached by his creditors. *Sloan v. Birdsall*, 34 St. Rep. 804, 11 Supp. 814.

A judgment-creditor of a wife whose debt was contracted prior to the granting of a decree of divorce to her, cannot reach any portion of the alimony awarded her by such decree. *Andrews v. Whitney*, 82 Hun, 117, 63 St. Rep. 486, 34 Supp. 164.

A judgment due the debtor may be reached — *Egberts v. Pemberton*, 7 Johns. Ch. 208 — as may the interest of a vendee who has paid for land; *Watson v. Lerow*, 6 Barb. 481; the interest of one as next of kin in a decedent estate; *McArthur v. Hoysradt*, 11 Paige, 495; but not the interest of one as next of kin of a

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person living. *Smith v. Kearney*, 2 Barb. Ch. 533. Property in the hands of a fraudulent assignee may be reached; *Hammond v. Hudson, etc. Co.* 20 Barb. 378; salary earned; *Thompson v. Nixon*, 3 Edw. 457; an interest in lands as tenant by the curtesy; *Ellsworth v. Cook*, 8 Paige, 643; an annuity in lieu of dower; *De Graaf v. Clason*, 11 Paige, 136; a right of dower before assignment; *Tompkins v. Fonda*, 4 Paige, 448; *Stewart v. McMartin*, 5 Barb. 438; defendant's interest in the effects of a copartnership; *Eager v. Price*, 2 Paige, 333; *Taylor v. Perkins*, 26 Wend. 125; a legacy; *Hallett v. Thompson*, 5 Paige, 583; rights under a patent; *Gillett v. Bates*, 86 N. Y. 87; salary to be earned cannot be reached; *Browning v. Bettis*, 8 Paige, 569; *McCoun v. Dorschheimer*, 1 Clarke, 144; property exempt by statute cannot be reached; *Andrews v. Rowan*, 28 How. 126; *Cooney v. Cooney*, 65 Barb. 524; money due from a wife to a husband for services rendered in her separate business cannot be reached. *Kingman v. Frank*, 64 How. 520. Where the debtor dies before the judgment becomes a lien, the creditor's bill cannot reach personal property in the hands of next of kin. *Wilbur v. Collier*, 3 Barb. Ch. 427. The amount of a policy of insurance on the life of her husband, received by a wife where the policy was issued for the benefit of herself and her children, cannot be made subject to the claims of her creditors. *Leonard v. Clinton*, 26 Hun, 288. Money paid on an illegal contract cannot be reached unless the specific fund can be traced and identified. *Ogden v. Wood*, 51 How. 375. The rents of real estate sold under execution, where the debtor is entitled to remain in possession, may be reached. *Farnham v. Campbell*, 10 Paige, 598. Money paid by the government on account of a debt due the debtor may be reached, though it is paid to his heirs with intent to defraud the claim. *Austin v. Tompkins*, 3 Sandf. 22. A creditor's claim must be ascertained and determined by a valid judgment before he can proceed in equity for the collection of a debt out of equitable assets. *Burnett v. Gould*, 27 Hun, 366. It seems an action will lie to reach a seat in the Exchange, after the refusal of the Exchange to transfer it, where duly required, to the member's assignee in bankruptcy. *Platt v. Jones*, 96 N. Y. 24. In a receiver's action to reach moneys equitably due to the judgment-debtor, his interest is not limited by that of the creditors, but he succeeds to the rights of the debtor and may recover all that is equitably due him.

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His recovery is, therefore, subject to all allowances which are proper against the judgment-debtor. *For v. Hodge*, 17 Week. Dig. 412. A judgment-creditor's action, either under the Code or the Revised Statutes, can only reach property belonging to the judgment-debtor or held in trust for him, and the pleadings must present such a trust within the statute. *Nicer v. Crane*, 98 N. Y. 40. A creditor's suit will not lie to have a trust created by a debtor for the benefit of his wife during life, then for the benefit of himself during life, remainder to his children, declared void as to the part for his own benefit, inasmuch as his wife may survive him, and the action is based upon a mere possibility and presumption. *Myer v. Thompson*, 35 Hun, 561. A creditor may reach property which his debtor paid for, but caused to be conveyed to another person, although his judgment never was a lien on the property, or by reason of the lapse of time had ceased to be a lien on the property. *Scoville v. Shed*, 36 Hun, 165. An insurance policy upon the life of a husband for the benefit of the wife cannot be compelled to be assigned in a judgment-creditor's action, nor, can the avails thereof be apportioned in advance of such decree to the payment of debts or held for the benefit of creditors. *Baron v. Brummer*, 100 N. Y. 372. The fact that a creditor who sells property of his debtor which has been transferred to him as collateral security, realizing less than the amount of his claim, allows part of such consideration to pass to the debtor's wife, does not give the creditors of the same debtor a claim upon the property in the hands of the wife. *Popfinger v. Yutte*, 102 N. Y. 38. Where the daughter of a judgment-debtor took title to a piece of property upon which the debtor, as her agent, erected a building, *held*, the creditors had no interest therein. *Parks v. Murray*, 2 St. Rep. 628. The rule that property of an insolvent partnership cannot be applied to the satisfaction of the individual debts of a partner was applied in a creditor's suit to reach property assigned by such firm in *Fuller Electrical Co. v. Lewis*, 101 N. Y. 674. An assignment to a receiver becomes void as soon as the object of the suit is accomplished, and when the purpose is fulfilled, the property reverts to the grantor without reassignment. *Anderson v. Treadwell*, 1 Edw. 201. As against a judgment-creditor not a party to the suit, the title of a receiver appointed in such a suit, to whom the debtor assigns, relates not to the time of filing the bill, but to the date of the assignment.

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Watson v. N. Y. C. R. R. Co. 6 Abb. (N. S.) 91, affirmed, 47 N. Y. 157. A receiver can be appointed in a creditor's suit, after the defendant's death, where the action was begun before his death. *Broten v. Nichols*, 9 Abb. (N. S.) 1, 42 N. Y. 26. If a suit is brought on behalf of all judgment-creditors a sale by the receiver bars the claim of a defendant asserting a lien but who failed in his defence. *Shand v. Hanley*, 71 N. Y. 319.

Surplus income of personal property held by another for the debtor's use and not necessary for the support, etc., may be reached. *Hallett v. Thompson*, 5 Paige, 583. But only where it is in excess of the sum needed for the support of the debtor and his family. *Bramhall v. Ferris*, 14 N. Y. 41. The statute is limited to the portion of the trust fund necessary for the support of the debtor and his family. *Rider v. Mason*, 4 Sandf. Ch. 351. See *Jackson v. Prime*, 12 Week. Dig. 103. Where a judgment-debtor is the beneficiary of a trust under and by which the trustees are required to receive and pay over to him the trust estate, an action may be maintained by a judgment-creditor, after the return of an execution unsatisfied, to reach the surplus income beyond what is necessary for the suitable support and maintenance of the *cestui que trust* and those dependent on him; this is so whether the trust is personal or real; the remedy of the creditor is not confined to the accumulated surplus; provision may be made in the judgment determining what is a proper allowance for the *cestui que trust*, and directing the application of the balance toward the payment of the judgment. *Williams v. Thorn*, 70 N. Y. 270; *McEvoy v. Appleby*, 27 Hun, 44; *Tolles v. Wood*, 99 N. Y. 616. A receiver in supplementary proceedings may maintain such an action. *McEwen v. Brewster*, 19 Supp. 189. Where a judgment-creditor seeks to compel so much of the income of a *cestui que trust* as exceeds what is necessary for his suitable support and maintenance to be applied to the payment of his debt, the court, in determining what is the proper amount to be allowed for the expenses of the *cestui que trust*, will consider the manner in which he has been brought up, the habits acquired by him, and his ability to take care of his property. To entitle a plaintiff to succeed in such an action he must prove that there is a surplus of income, and where he fails to do so, his complaint will be dismissed. *Kilroy v. Wood*, 42 Hun, 636, citing upon the right to reach the income, *Graff v. Bonnett*, 31 N. Y. 9; *Sillick v. Mason*, 2 Barb. Ch. 79.

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The creditor by the commencement of the action acquires a lien upon the accrued or unexhausted surplus, or that subsequently arising, superior to the claims of general creditors or assignees of the *cestui que trust*. *Tolles v. Wood*, 99 N. Y. 616. Where the judgment directed payment of plaintiff's debt and costs from the surplus, on failure of the trustees to do so after proper demand, execution against their individual property held proper. It seems that the remedy of defendants, in case the judgment is not correct in stating the amount in their hands, is by motion to correct the judgment. *Thorn v. Williams*, 81 N. Y. 381. For form of complaint, see *Miller v. Miller*, 1 Abb. N. C. 30.

It is said in *Higgins v. McConnell*, 130 N. Y. 482, 42 St. Rep. 363, that these provisions were adopted in order to mitigate the injustice of the rule that an interest in land should not be bound by the docketing of a judgment or decree, nor sold by execution issued thereon.

The remedy of a creditor seeking to reach the surplus income of a trust fund is not confined to that already accrued, but a decree may provide for an application for future accumulations. *Wetmore v. Wetmore*, 79 Hun, 268, 60 St. Rep. 569, 29 N. Y. Supp. 440, affirming 31 Abb. N. C. 239, 8 Misc. 51, 58 St. Rep. 751, 28 Supp. 377.

An exhaustive review of legislation on this subject and references to numerous authorities is found in note 16 Abb. N. C., page 20. The note treats of the rights of a creditor, the mode of remedy, the mode of reaching a surplus, the mode of enforcing resulting trusts. The provisions of the Code relative to this matter are collated and compared with those of the Revised Statutes.

In *Smith v. Barnum*, 3 Supp. 476, § 1879 is applied to the case of a trust estate. The rule requiring that execution shall issue before an equitable action of this kind can be maintained has not been changed by §§ 1784 or 1879 of the Code relating to judgments recovered against domestic corporations, and such sections do not refer to or include an action of this description. Actions of this character depend wholly upon the established rules of courts of equity. *Easton National Bank v. Buffalo Chemical Works*, 48 Hun, 557.

Where a judgment-debtor is the beneficiary of a trust under which money is to be kept invested during her life and the income

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applied to her use, an action may be maintained by a judgment-creditor to reach the surplus income beyond what is necessary for the proper maintenance of the beneficiary and those legally dependent upon her. *Howard v. Leonard*, 3 App. Div. 277.

Where it is sought to reach the income of a fund placed in the hands of trustees to be applied to the benefit of the debtor, a creditor can only claim that which is in excess of the amount sufficient to maintain the debtor in the manner in which he was brought up and accustomed to. *Stover v. Chapin*, 21 St. Rep. 38, 4 N. Y. Supp. 496. Any successor of a trustee who has been removed is in a position to maintain a creditor's suit against such trustee. *Stokes v. Amerman*, 121 N. Y. 337, 31 St. Rep. 391, affirming 55 Hun, 178, 28 St. Rep. 77, 8 Supp. 150. When an assignee for the benefit of creditors had refused to bring an action to set aside fraudulent transfers, a creditor at large may sue in aid of the assignment and to protect the trust fund. *Riessner v. Cohn*, 22 Abb. N. C. 312, 1 Supp. 161, same volume, Abb. N. C., at page 327, contains a very full note in which the duties of assignees and executors in regard to bringing actions of this character and of remedies of creditors are discussed and the authorities collated.

Such an action cannot be maintained by creditors until the assignee has refused to bring it. *Strickland v. Laraway*, 29 St. Rep. 873, 9 N. Y. Supp. 761. But a creditor may sue to set aside a fraudulent transfer where the assignee for creditors is in collusion with fraudulent grantee without his requesting the assignee to sue. *Kendall v. Mellen*, 36 St. Rep. 805, 13 Supp. 207. An action of this character cannot be maintained to set aside a transfer made on settlement of a usurious obligation, being a benefit personal to the borrower which cannot be taken advantage of by the judgment-creditor. *Kelley v. Sprague*, 36 St. Rep. 445, 13 N. Y. Supp. 64. Where the remedy at law has not been exhausted, an action to reach equitable interests or assets subject to levy and sale on execution, cannot be maintained. *Kerr v. Dilline*, 60 Hun, 315, 38 St. Rep. 1005, 15 N. Y. Supp. 58, 20 Civ. Pro. R. 366.

While the commencement of an action in the nature of a creditor's bill creates a lien upon the choses in action and equitable assets of the judgment-debtor, it does not create a lien upon his tangible personal property subject to levy under execution unless

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the creditor procures the appointment of a receiver. *Kitchen v. Lowery*, 127 N. Y. 53. An action by a creditor at large of a deceased insolvent debtor to set aside fraudulent transfers of property by the deceased can only be maintained for the benefit of himself and other creditors, but it must appear from the face of the complaint that it is so prosecuted. *Louis v. Belgard*, 43 St. Rep. 766, 17 Supp. 882.

A creditor at large cannot attack the validity of a judgment against his debtor in such an action. *Frothingham v. Hoenpfl*, 41 St. Rep. 398, 16 Supp. 341. Equitable assets can only be reached after the remedy at law has been exhausted, the evidence of which is a return of execution unsatisfied. *Harvey v. Brisbin*, 143 N. Y. 151. Where a transfer of personal property is valid as between the transferer and transferee, the court, in an action brought by a creditor of the transferer to set aside the transfer as fraudulent to him, will, in a proper case, set the transfer aside only as far as it is necessary to do so in order to pay the amount due to the plaintiff as fixed by his judgment and the expense of executing it. Judgment in such an action, setting aside the transfer and appointing a receiver of the defendant's property, should provide that upon the satisfaction of the plaintiff's judgment and the payment of the expenses of enforcing it, the property be returned to the transferee. *Comyns v. Ryker*, 83 Hun, 471, 65 St. Rep. 72, 31 Supp. 1042.

A judgment-creditor without a lien on the property of the judgment-debtor cannot maintain an action against him and another for the fraudulent transfer of his lands. *Hurwitz v. Hurwitz*, 10 Misc. 353, 63 St. Rep. 415, 31 Supp. 25, distinguishing *Quinby v. Straus*, 90 N. Y. 664. It seems the remedy of a creditor against a transfer which is invalid as creating an excessive preference, in violation of the provisions of the General Assignment Law, is in equity to secure to himself and the other creditors who were excluded from the transfer, the ratable distribution of two-thirds of the assets, and that an action cannot be maintained by a single creditor to avoid the assignment and to appropriate the entire assigned property to the payment of his own claim, this creating a preference in his favor. *Maass v. Falk*, 146 N. Y. 34, 65 St. Rep. 762.

The difficulties which have arisen with reference to the effect of prosecution of a creditor's bill and judgment setting aside con-

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veyances is clearly stated in Bishop on Insolvent Debtors, at page 341 in this language: "Where judgments are docketed against a debtor who has made the fraudulent conveyance of his real estate, and actions are subsequently brought by junior judgment-creditors who succeed in setting aside the fraudulent conveyance, the question has arisen whether by their diligence they are entitled to satisfaction of their judgments in priority to senior judgments which have been docketed." This point would seem, however, to have been substantially settled by *Wilkinson v. Paddock*, 57 Hun, 191, affirmed without opinion, 125 N. Y. 748, where it is *held*, "The doctrine of the authorities seems to be to the effect that as to real estate, judgment-creditors acquire liens thereon in the order in which their judgments are docketed, and that their priority is not affected by suits brought to set aside a fraudulent transfer of such real estate;" citing *White's Bank v. Farthing*, 101 N. Y. 344; *Underwood v. Sutcliffe*, 77 N. Y. 58; *N. Y. Life Ins. Co. v. Mayer*, 19 Abb. N. C. 92, 12 St. Rep. 119; *O'Brien v. Browning*, 49 How. 109. It is true *Brooks v. Wilson*, 53 Hun, 173, holds that where property has been fraudulently transferred by an insolvent debtor with intent to defraud his creditors, and judgment-creditors of the debtor bring successive actions to set aside the fraudulent conveyance, they will acquire priority of right in the property so fraudulently transferred, not in the order of the date of the docketing of their respective judgments, but in that of the commencement of the actions for their enforcement against the property fraudulently conveyed; reversed, however, 125 N. Y. 256, without passing upon that point. This view is strengthened by the fact that in *N. Y. Life Ins. Co. v. Mayer*, 12 St. Rep. 119, affirmed, 108 N. Y. 655, without opinion, it was held that, as far as real estate is concerned, judgment-creditors will acquire liens thereon in the order in which their judgments are docketed, and this priority will not be disturbed or affected by the order in which equity suits are brought to set aside fraudulent assignments affecting such real estate. Suits in equity to set aside a fraudulent assignment or conveyance may inure for the benefit of such judgment-creditors by removing an apparent obstacle in the way of enforcement of their legal rights. But such an equity suit, even though resulting in a judgment setting the assignment aside, creates no specific lien upon real estate, as it might upon purely equitable assets or upon personal property. Judg-

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ment-creditors will retain their liens and may enforce the same in the order of the docket regardless of the fact that junior judgment-creditors have been more diligent in commencing equity suits and in obtaining therein decrees adjudging an assignment void.

On the other hand, the fact that a judgment-creditor filing a bill in equity to set aside fraudulent transfers, acquires a lien upon the equitable assets of the judgment-debtor is well settled. *Hayden v. Bucklin*, 9 Paige, 512; *Utica Ins. Co. v. Power*, 3 Paige, 365; *Beck v. Burdett*, 1 Paige, 305; *Jeffries v. Cockrane*, 47 Barb. 557, affirmed, 48 N. Y. 671; *Talcott v. Thomas*, 50 St. Rep. 621; *Metcalf v. Del Valle*, 64 Hun, 245. By the commencement of a creditor's action, a lien is acquired upon the choses in action and equitable assets of the debtor and also an inchoate lien against all his tangible assets, which is good as against his executrix. *First National Bank of Amsterdam v. Shuler*, 89 Hun, 303, 35 Supp. 171, 69 St. Rep. 287. But after the appointment of an assignee in bankruptcy, a creditor of the bankrupt can gain no preference by bringing an action to set aside the conveyance as fraudulent in case the assignee fails or refuses to do so. *Holmes v. Little*, 86 Hun, 226, 33 Supp. 225, 66 St. Rep. 789.

In *Claylin v. Gordon*, 39 Hun, at page 57, Bradley, J., lays down the rule that "By the commencement of an action in equity by a judgment-creditor as such, he obtains a lien upon the things in action and equitable interests of the debtor which is defeasible until and becomes effectual upon his recovery of judgment, citing *Edmeston v. Lynde*, 1 Paige, 637; *Edger v. Price*, 2 Paige, 333; *Clarkson v. DePeyster*, 3 Paige, 320; *Utica Ins. Co. v. Power*, 3 Paige, 365; *Storm v. Waddell*, 2 Sandf. Ch. 494; *Boynston v. Ratson*, Clarke's Ch. 410, but states the rule to be otherwise in respect to property which is the subject of levy by execution in so far that the action is no interruption to such legal remedy and no lien is acquired in or by an action to defeat the right to make such a levy until a receiver is appointed, citing *Davenport v. Kelly*, 42 N. Y. 193; *Albany City Bank v. Schermerhorn*, Clarke's Ch. 297; *Storm v. Badger*, 8 Paige, 130. He says, further, the situation produced by an action in equity is such that the parties have not the right during its pendency to voluntarily dispose of the property involved in it so as to defeat the operation of the judgment that may be recovered; and, fur-

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ther, that as a necessary consequence third persons charged with notice of pendency of the action are affected in like manner, so that the property may be protected for the purposes of the action, against the interference or the taking of any right by means of transfer of it to the prejudice of the relief of the plaintiff derivable from its results, citing *Murray v. Ballou*, 1 Johns. Ch. 566; *Heatley v. Finster*, 2 Johns. Ch. 158; *Green v. Slayter*, 4 Johns. 38; *Scudder v. Van Amburgh*, 4 Edw. Ch. 29; *Hadden v. Spader*, 20 Johns. 554, affirming 5 Johns. Ch. 280.

The following authorities bear upon this question: *Van Alstyne v. Cook*, 25 N. Y. 489; *Becker v. Torrance*, 31 N. Y. 631; *Davenport v. Kelly*, 42 N. Y. 193. And the rule already cited, as held in *Claflin v. Gordon*, 39 Hun, 54, will be found stated in *Boynton v. Rawson*, 1 Clarke's Ch. 410; *Corning v. White*, 2 Paige, 567; *Fitch v. Smith*, 10 Paige, 9.

A judgment-creditor who brought an action to set aside a transfer of life insurance policy by a judgment-debtor as fraudulent, obtains a lien and preference over the receiver appointed in supplementary proceedings and over all other creditors. *Metcalf v. Del Valle*, 64 Hun, 245, 46 St. Rep. 105, 19 Supp. 16.

Precedent for Judgment.

(Title as before.)

This action having been referred to R. Bernard, Esq., counselor at law, to hear and determine, and the said referee having, on the 5th day of January, 1888, duly made and filed his report in writing directing that the several conveyances of real estate set forth in the complaint be adjudged fraudulent and void as against this plaintiff, and that a receiver be appointed to sell said real estate, and on application to the court, Grove Webster, Esq., of the city of Kingston, Ulster county, N. Y., having been duly appointed such receiver, and the costs of the plaintiff having been duly adjusted at \$545.21; Now, on motion of Linson & Van Buren, attorneys for the plaintiff, it is adjudged that a certain deed, bearing date the 7th day of September, 1874, and certified to have been executed by the grantors on that date, executed by the defendants Benedict Dreyfus and Rose, his wife, to the defendant Edward Dreyfus, and which deed is recorded in the county clerk's office of Ulster county, in liber of deeds No. 194, page 600, August 25, 1885 (then follow with description), was and is fraudulent and void as to this plaintiff, and no title or interest as against these plaintiffs was conveyed by said deed, and said premises and the whole thereof are subject to the payment of a certain judgment obtained by this plaintiff against the defendant Benedict Dreyfus, and docketed in Ulster county clerk's office on the 13th day of January, 1876, for the sum of

Art. 3. Injunction and Receiver.

§3,498.36. And it is further adjudged that a certain deed or conveyance of real estate, bearing date the 14th day of February, 1876, and certified to have been acknowledged on that day, executed by the defendants Edward Dreyfus and Flora, his wife, to the defendant Lewis Gans, and which said deed was recorded in Ulster county clerk's office on the 21st day of February, 1876, in book of deeds No. 198, at page 28, etc., and which said deed purported to convey the six lots hereinbefore described, as described in a deed from Benedict Dreyfus and wife to Edward Dreyfus, dated September 7, 1874, was and is fraudulent and void as against this plaintiff, and no title or interest as against these plaintiffs was conveyed by said deed, and said premises, and the whole thereof, are subject to the payment of the judgment against the defendant Benedict Dreyfus, such deed to the contrary notwithstanding. And it is further adjudged that Grove Webster, Esq., receiver of said property hereinbefore described, proceed to sell said real estate at public auction, first giving notice, as is required by law and the practice of this court on sales of mortgaged premises or foreclosure by action, or so much thereof as may be necessary to pay the judgment of the plaintiff hereinbefore described, with interest thereon from the date of its rendition, and also the costs of the plaintiff, as taxed, with the interest thereon from the date of the taxation, together with his fees and the expenses of the sale; that he pay such costs with the interest thereon to the plaintiff's attorneys, and the amount of said judgment, with the interest thereon, to the plaintiffs or their attorneys, and that he execute a deed or deeds to the purchaser or purchasers of said premises on said sale; that either of the parties hereto may become the purchaser at said sale; that he make a report to the court of his proceedings under this judgment; that the purchaser or purchasers at said sale be let into possession of the property purchased by them on production of the receiver's deed for the property purchased.

Dated January 27, 1888.

C. B. SMITH,
Deputy Clerk.

ARTICLE III.

INJUNCTION AND RECEIVER. §§ 1876, 1877.

§ 1876. Injunction may be issued.

A temporary injunction, restraining the transfer to any person, or the payment or delivery to the judgment debtor, of any money, thing in action, or other property or interest, which may, by the provisions of this article, be applied to the satisfaction of the sum due to the plaintiff, may be granted in the action. The injunction, and the proceedings before and after it is granted, are governed by the provisions of article first of title second of chapter seventh of this act; for which purpose, the injunction is deemed to be one of those specified in section 603 of this act.

§ 1877. Receiver may be appointed.

The court may, by an order, or by the interlocutory or final judgment in the action, appoint a receiver of any or all of the property of the judgment debtor; and may direct the judgment debtor, or any other defendant in the action, to

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convey or deliver to the receiver, as justice requires, any property, real or personal, book, voucher, or other paper, or to execute any instrument, which it deems necessary, for perfecting or assuring the receiver's title or possession.

In an action to set aside an alleged fraudulent transfer of stock and for an injunction and a receiver, an injunction *pendente lite*, restraining the incumbering or disposal of the stock may properly be granted, as such relief is essential to the judgment demanded and necessary to make it effectual. *McKaye v. Soule*, 56 St. Rep. 56. The authority to grant an injunction and appoint a receiver in an action in the nature of a creditor's bill existed before the Code and has been continued under its provisions. *Hagarty v. Pittman*, 1 Paige, 298; *Bloodgood v. Clark*, 4 Paige, 574; *Lent v. McQueen*, 15 How. 313; *Conner v. Sedgwick*, 1 Barb. 210; *Whitcomb v. Fowler*, 7 Abb. N. C. 295; *Manning v. Stern*, 1 Abb. N. C. 409.

A clear case must be presented for the exercise of this power. *Minzesheimer v. Meyer*, 66 How. 484. Instances where this power has been exercised are *Empire Paving & Construction Co. v. Robinson*, 33 St. Rep. 897; *People's Bank v. Fancher*, 21 Supp. 545; *Babcock v. Jones*, 62 Hun, 565.

Where the cause is tried before a referee, his report stands as the decision of the court, but the practice is to apply at Special Term to name the receiver. *Durant v. Pierson*, 33 St. Rep. 207.

A receiver appointed in a creditor's action may maintain an action to determine priorities between conflicting claims to the fund remaining in his hands after final judgment. *Bamberger v. Fillebroten*, 12 Misc. 328, 33 Supp. 614, 67 St. Rep. 321.

Order for Receiver.

(Title as before.)

(Caption, usual form.)

On reading and filing the report of R. Bernard, Esq., the referee herein, which was filed with the clerk of the court on the 5th day of January, 1888, and the affidavit of John J. Linson, verified January 6, 1888, and after hearing John J. Linson, of counsel for the plaintiff, and William L. Lawton, of counsel for the defendants: Now, on motion of Linson & Van Buren, attorneys for the plaintiff, it is ordered that Grove Webster, Esq., residing at the city of Kingston, Ulster county, N. Y., be and he hereby is appointed receiver of the real estate described in the complaint, upon his executing, acknowledging and filing with the clerk of Ulster county his bond in the penal sum of \$1,000, with sufficient sureties, conditioned for the faithful execution of the trust as such receiver, to be approved both as to form and as to the sufficiency of the sureties by a justice of this court.

Art. 3. Injunction and Receiver.

It is further ordered that the defendant Benedict Dreyfus convey to such receiver all his right, title and interest in the property described in the complaint and in the judgment herein.

And it is further ordered that the said receiver, on filing said bond, proceed to sell the real estate described in the complaint in this action, at public auction, first giving the same notice as is required by law and the rules of this court on the sale of mortgaged real estate under foreclosure by action, or so much thereof as shall be necessary to pay the claim of the plaintiff and its costs and disbursements in this action, together with the fees and the expenses of the sale; that he execute a deed or deeds to the purchaser or purchasers of said premises, that either party may become purchaser on said sale; that the purchaser be let into possession on production of the receiver's deed; that out of the proceeds of such sale he pay to the plaintiff or its attorneys the sum of \$3,498.36, with interest thereon from the 13th day of January, 1876, being the amount of the claim of the plaintiff, and also to said plaintiff's attorneys the costs and disbursements of the plaintiff herein, as the same may be taxed by the clerk; that he thereupon, on notice to the parties in this action, make a report to the court of his proceedings, and the amount, if any, remaining in his hands.

It is further ordered that the plaintiff may at its election proceed to sell the premises described in the complaint with the same force and effect as if the conveyances adjudged fraudulent in this action had not been made, and for that purpose to issue execution on its judgments.

And it is further ordered that an extra allowance of five per cent on the amount of the plaintiff's judgment, with interest thereon from the date of its rendition, be and the same hereby is allowed to the plaintiff herein, and the same shall be taxed as a part of the costs of the plaintiff.

S. L. MAYHAM,
Justice Supreme Court.

CHAPTER XXVII.

ACTION BY PRIVATE PERSON UPON AN OFFICIAL BOND.

§§ 1880-1892.

SECTIONS OF THE CODE OF PROCEDURE AND WHERE FOUND IN THIS CHAPTER:

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§ 1880. [Am'd, 1895.] Application for leave to sue sheriff's bond ; proof required.

Where a sheriff is liable for the escape of a prisoner committed to his custody, or is guilty of any other actionable default or misconduct in his office, the person injured thereby may apply to the supreme court, for leave to prosecute the sheriff's official bond. The application must be accompanied with proof, by affidavit, of the default or misconduct complained of, and that satisfaction of the same has not been received ; and with a certified copy of the official bond.

§ 1881. Order granting leave ; action thereupon.

Upon such an application, the court must grant an order, permitting the applicant to maintain an action upon the bond. The action must be brought, in the court which granted the order, by the applicant as plaintiff ; and it may be maintained, as if the applicant was the obligee named in the bond, except as otherwise expressly prescribed in this article.

§ 1882. [Am'd, 1895.] Successive actions.

The same, or any other applicant, may, in like manner, either before or after judgment in the first action, obtain an order, permitting him to maintain another action, in the same court, upon the same bond, for another default or misconduct. Any number of such orders may be successively made ; and neither of the actions authorized thereby is affected by the pendency of, or the recovery of judgment in, any other, except as otherwise expressly prescribed in this article.

§ 1883. Indorsement upon execution.

Where an execution is issued upon a judgment, recovered against the sheriff and any of his sureties, in an action, brought pursuant to the last four sections, the plaintiff's attorney must indorse thereon a direction to collect the same, in

the first place, out of the property of the sheriff, and, if sufficient property of the sheriff cannot be found, then to collect the deficiency out of the property of the surety or sureties.

§ 1884. Collection of execution; when a defence to subsequent action.

It is a defence by a surety, against whom an action is brought upon a sheriff's official bond, that he, or any other surety or sureties, have been or will be compelled, for want of sufficient property of the sheriff, to pay, upon one or more judgments recovered against him or them, upon the same bond, an aggregate amount, exclusive of costs, officers' fees, and expenses, equal to the sum for which the defendant is liable, by reason of the bond. It is a partial defence, that the difference between the aggregate amount, so paid, or to be paid, and the sum for which the defendant is thus liable, is less than the amount of the plaintiff's demand.

§ 1885. When claimants entitled to ratable distribution.

If the aggregate amount of the liabilities, which might be recovered by actions upon the sheriff's official bond, as prescribed in this article, exceeds the sum for which the sureties are liable, the court must, upon the application of a person who has obtained leave to prosecute the bond, made upon notice to the plaintiff's attorney, in each action then pending upon the sheriff's official bond, and in each uncollected judgment recovered thereupon, direct and provide for the distribution of the money, collected out of the property of the sureties, among the persons in favor of whom the liabilities have accrued, in proportion to the amount which each one is entitled to recover; to be ascertained by a reference, or in such other manner as the court directs. For the purposes of the motion an order may be made by a judge, forbidding the payment to the plaintiff in any action, of the sum collected or to be collected by virtue of a judgment therein. But this section does not authorize the court to compel a plaintiff to refund any money, collected and received by him, in good faith, before service of notice of such an order.

§ 1886. Action upon a surrogate's bond.

Where a surrogate, or an officer acting as surrogate, is guilty of any actionable default or misconduct in his office, the person injured thereby may apply for leave to prosecute the delinquent's official bond.

§ 1887. Action upon a county treasurer's bond.

Where a certified copy or the order or judgment of a court, directing a county treasurer to pay or deliver to one or more persons designated therein any money, stocks, securities, or other investments held by him, subject to the direction of that court, is served upon the county treasurer, if he fails to obey the direction, the person injured thereby may apply for leave to prosecute his official bond. Service upon a county treasurer, as required by this section, may be made personally, or by leaving the paper, either at his office, during his absence therefrom, with a person of suitable age and discretion, having charge of the office, or at his residence or his last residence within the county, with a person of suitable age and discretion.

§ 1888. Actions upon official bonds of other officers.

Where a public officer is required to give an official bond to the people, and special provision is not made by law for the prosecution of the bond, by or for

the benefit of a person who has sustained, by his default, delinquency or misconduct, an injury, for which the sureties upon the bond are liable, such a person may apply for leave to prosecute the delinquent's official bond.

§ 1889. Actions, etc., under the last three sections regulated.

Sections 1880 to 1885 of this act, both inclusive, govern an application, made as prescribed in either of the last three sections, and each action brought pursuant to an order made thereupon, as if the delinquent officer and his sureties were named therein instead of the sheriff and his sureties.

§ 1890. Receivers, etc., deemed public officers.

A receiver, an assignee of an insolvent debtor, or a trustee or other officer, appointed by a court or a judge, is a public officer, within the meaning of the last section but one; but where he was appointed by or pursuant to the order of a court, or in a special proceeding specified in title twelfth of chapter seventeen of this act, the application for leave to prosecute his official bond must be made to the court by which, or pursuant to whose order, he was appointed, or in which the judgment was rendered, as the case may be. An action, brought as prescribed in this section, must be brought in the court to which application is made for leave to bring it.

§ 1891. Demand of money; when necessary before application.

Where the default, by reason of which an application for leave to prosecute an official bond is made, as prescribed in this article, consists of the non-payment of money, and special provision is not otherwise made by law, the applicant must prove a demand of the money from the officer, or that a demand cannot be made, with due diligence. But such proof is not necessary where the applicant has recovered a judgment against the officer.

§ 1892. Application may be made ex parte.

An application for leave to prosecute an official bond, as prescribed in this article, may be made without notice; but in that case the officer, or either of his sureties, may apply, upon notice, to vacate an order permitting the applicant to maintain an action, upon any ground, showing that it ought not to have been granted.

The bonds provided for by § 1880 are official bonds of the respective officers, running to the people of the State as required by the provisions of the Revised Statutes and are penal in their character. They do not refer to the case of a bond required to be given by a constable of the city of Buffalo. *Levin v. Robie*, 5 Misc. 528.

It is said in *People v. Conner*, 8 Hun, 533, that the object of requiring an application to be made for leave could have been nothing else than to require the court before whom it should be given, to make such an investigation into the case as would enable it to determine whether the suit would be just or proper; the power to give the leave implies the existence of power to deny it. The provision was evidently intended to protect the sheriff and his

sureties against needless actions, and at the same time allow all such suits upon the bond as should appear to be reasonably necessary. The language of the statute so construed was "shall order;" the language of this section is "must order." See *Anderson v. Hitchcock*, 2 Wend. 299. It is not necessary to obtain a judgment against the sheriff before obtaining leave to sue the bond. *Ex parte Chester*, 5 Hill, 555; *Rhinclander v. Mather*, 5 Wend. 102.

Where the relator, the then surrogate, having demanded payment of moneys deposited with his deceased predecessor, in his official capacity, from the administrators of such predecessor, and payment having been refused, brought an action in the name of the people against the sureties, on the official bond of such deceased surrogate, *held*, that the people were entitled to maintain the action as the trustees of an express trust. To constitute a defence to such an action, it must at least be shown, that in the management of the fund the surrogate had acted without fault and that he had been free from all negligence. *People ex rel. Nash v. Faulkner*, 38 Hun, 607, 107 N. Y. 477.

The bond of a supervisor given to the town clerk for the benefit of the town may be sued by the succeeding supervisor in his name, for the use of the town. *Sutherland v. Carr*, 85 N. Y. 105.

As to giving permission to sue the bond of a master in chancery, *Matter of Van Epps*, 56 N. Y. 599.

Under an obligation to make good all defaults of an officer during his continuance in office, the surety is liable for defaults during the term for which he was appointed at the time the obligation was entered into, and not for those which happen under his reappointment. Where the officer is appointed for one year and until another is appointed in his stead, the surety is liable for default during the first year only. *Kingston Mutual Ins. Co. v. Clark*, 33 Barb. 196. See *Overacre v. Garrett*, 5 Lans. 156. The sureties on an official bond are not liable for defaults committed during a prior term of the same office. *Bissell v. Saxton*, 66 N. Y. 55; *Kellum v. Clark*, 10 Week. Dig. 492. Even if the principal had under his control property which he might if he had chosen, have transferred or converted into money and transferred to himself in his official capacity. *Bissell v. Saxton*, 77 N. Y. 191. The undertaking of sureties on an official bond, that the officer shall faithfully perform his duties, involves the obligation of mak-

ing correct accounts, conforming to the requirements of the statutes, as well as the payment of the funds in his custody. *Supervisors of Tompkins v. Bristol*, 99 N. Y. 316. It is said to be no defence to a bond that it is not in the exact form prescribed by statute. *Jones v. Newman*, 36 Hun, 634. In an action upon the bond of an overseer of the poor it is necessary to show, as against the sureties, not merely that their principal was indebted, but that such indebtedness arose by reason of not accounting for money actually received by him during the term for which the sureties stood bound. *Kellum v. Clark*, 97 N. Y. 390. Where a collector received moneys officially, in excess of the town's needs, his sureties were held liable upon his official bond, on his failure to account therefor. *Sutherland v. Carr*, 85 N. Y. 105. In an action on the official bond of a tax collector, it is no defence that the warrant was not delivered at the time required by law; that it did not contain any return day; that it was only partly filled out, and that the collector had paid over all the moneys collected. *Bradley v. Ward*, 1 T. & C. 413; S. C. 58 N. Y. 402. Where an official bond was not sealed, and on default the sureties gave their note, *held*, they must be presumed to have known the defect in the instrument and waived the objection thereto. *Raymond v. Lent*, 14 Johns. 401. The sureties are not discharged by legislation, subsequent to the delivery of the bond, which modifies the duties of the office, for the faithful performance of which, by their principal the bond was given. *People v. Vilas*, 36 N. Y. 459. Especially where the acts for which it is sought to hold the surety liable were not done in pursuance of such new authority. *Mayor of New York v. Ryan*, 35 How. 408. The sureties are liable for the duties existing at the time of the signing the bond where those duties have not been substantially or materially changed. *Supervisors of Monroe v. Clark*, 25 Hun, 282. They are not discharged by omission of duty, or non-action by the obligees, or by the non-performance of any duty which is not owing directly to the surety. *Supervisors of Monroe v. Otis*, 62 N. Y. 88. The sureties on the official bond of an officer *de facto* are estopped from denying their liability as such. *Fake v. Traut*, 39 N. Y. 394. The sureties are properly chargeable with interest which a county treasurer was bound to pay over to his successor, but which he failed to do. *Supervisors of Monroe v. Clark*, 92 N. Y. 391. Where persons become sureties upon a bond they

make themselves privies to the proceedings against their principal, and when he, without fraud or collusion, is concluded, they are also concluded. *Baggott v. Boulger*, 2 Duer, 160; *Raplye v. Prince*, 4 Hill, 119; *Bartlett v. Campbell*, 1 Wend. 50; *Methodist Church v. Barker*, 18 N. Y. 463; *Latton v. Green*, 64 N. Y. 331; *Scotfield v. Churchill*, 72 N. Y. 565; *Jordan v. Volkening*, 72 N. Y. 300; *Fay v. Ames*, 44 Barb. 327; *Gerould v. Wilson*, 81 N. Y. 573. An officer's accounts are admissible in evidence against his surety to show his indebtedness. *Board of Education v. Heckox*, 12 Week. Dig. 206. A resolution authorizing the taxing of a loss sustained by a tax collector on a municipality does not relieve the sureties. *Oakley v. Mayor of New York*, 49 Super. Ct. 549, affirmed, 70 Super. Ct. 612. Sureties are liable for moneys received by a sheriff after the bond was given, on process received by him before. *People ex rel. v. Rings*, 15 Wend. 623. Not for moneys received by a sheriff, as deputy of a former sheriff, but after they became sureties. *People ex rel. v. McHenry*, 19 Wend. 482. The bondsmen of a sheriff are liable where he seizes property of the wrong person under his process. *Dennison v. Plumb*, 18 Barb. 89; *People ex rel. v. Schuyler*, 4 N. Y. 173. The sureties of a sheriff are liable for his failure to respond to his liability as bail under the Code, for a person arrested who fails to give or justify bail, and the measure of damages is not the loss to the creditor by the escape, but the deficiency in the judgment against the sheriff. *People ex rel. v. Dikeman*, 3 Abb. Ct. App. Dec. 520.

It was held in *Supervisors of Monroe v. Clark*, 25 Hun, at page 288, that where the condition of the bond was to pay according to law and not upon demand, no demand was necessary. This action was properly brought before the present Code, as this section is not referred to, and the provision requiring demand is new. A like holding was had in *Board of Education v. Heckox*, 12 Week. Dig. 206, decided at about the same time and without reference to this provision.

An allegation of the recovery of a judgment against an assignee for the benefit of creditors is a sufficient pleading of the indebtedness in an action against the surety on the assignee's bond. A demand is not necessary where the judgment has been recovered against the assignee. *Pierpont v. McGuire*, 13 Misc. 70, 68 St. Rep. 197. Section 1891 does not apply where the officer absconds and makes a demand impossible. *Levison v. Hoffman*,

Precedent.

8 Misc. 583, 60 St. Rep. 582. The codifiers say that the statute was silent with regard to the matters of practice covered by § 1892, and that in passing it they have followed *Matter of Chamberlain*, 28 How. 1, where the practice seems to have been approved by the Supreme Court. See authorities cited under § 1913.

Complaint Against Sureties on Official Bond.

SUPREME COURT — LIVINGSTON COUNTY.

The People of the State of New York on the Relation of Edwin A. Nash, Surrogate of Livingston County,

agst.

107 N. Y. 477.

James Faulkner and Henry J. Faulkner, Survivors of Samuel D. Faulkner, Deceased.

The plaintiff in this action for a complaint against the said defendants alleges:

1. That at the general election held in and for the State of New York, on the 7th day of November, 1871, Samuel D. Faulkner in his lifetime, since deceased, was duly elected to the office of county judge of Livingston county, and that on the 1st day of January thereafter he entered upon the duties of the office to which he was elected. That by virtue of the said election, he became the surrogate of said county and that he continued to exercise the duties of said office during the term for which he was elected, which term expired on the last day of December, 1877.

2. That after his election and prior to his entering upon the duties of his office, he made, executed and caused to be filed in the clerk's office of Livingston county his official bond, that the said defendants James Faulkner and Henry J. Faulkner were his sureties on said bond, that the said bond is in the words and figures following, viz.: (Here insert bond.)

That the said bond was duly executed according to the requirements of the statute in such case made and provided, was duly acknowledged by the parties executing the same, and the said sureties justified as required by the statute; that said bond was made, executed, acknowledged and justified and was duly approved by the clerk of Livingston county on the 20th day of November, 1871, and was duly filed in his office as by reference to the said bond, acknowledgment, justification, approval and filing, indorsed upon the said bond will more fully appear.

3. That Samuel Finley, late a resident of the town of Geneseo in said county of Livingston, died seized and possessed of real estate and personal property, that Samuel Finley and John R. Strang were

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duly appointed administrators of all and singular the property and effects which were of the said Samuel Finley, deceased, and entered upon the discharge of their duties as such administrators.

4. That in the course of administration it was discovered by said administrators that the personal assets of the estate of the said Samuel Finley deceased, were insufficient to pay the debts incurred by said Samuel Finley, deceased, in his lifetime; that the said administrators having filed an inventory of the estate of said Samuel Finley, deceased, and within the time prescribed by law duly applied to the said Samuel D. Faulkner as such surrogate as aforesaid for an order for the sale of the real property of the said deceased; that the said Samuel Finley in his lifetime had executed and delivered to James J. Cone and Charles Jones, a mortgage upon the real estate or a portion thereof, of which he died seized, and for the sale of which the said administrators applied to such surrogate for leave to sell; that the said Cone and Jones commenced an action in the Supreme Court for the foreclosure of the said mortgage; that such proceedings were had in the said action that a judgment for foreclosure of the said mortgage and a sale of the mortgaged premises was duly entered in the clerk's office of Livingston county; that pursuant to the said judgment the premises were sold; that from the proceeds of the said sale the amount found due on the said mortgage was paid, and there was a surplus of \$1,657.46 which sum was paid to the treasurer of the county of Livingston as in and by said judgment directed; that afterwards and on the 22nd day of June, 1876, on the application of the administrators of said Samuel Finley, deceased, an order was made pursuant to the statute in such case made and provided, directing the treasurer to pay over the said sum to the surrogate of Livingston county; that pursuant to said order the said treasurer paid over the said money to the said Samuel D. Faulkner as such surrogate as aforesaid, and took his receipt therefor as by reference to the judgment roll containing the judgment of foreclosure and sale on said mortgage, the proceedings thereon, the order entered on the 22d day of June, 1876, now on file in the clerk's office of Livingston county, and the receipt of the said Samuel D. Faulkner, as such surrogate, now on file in the treasurer's office of said county.

5. That by an act of the legislature of this State, passed March 9, 1874, the district attorney of said county of Livingston was authorized to discharge the duties of surrogate of the said county during the inability of the county judge and surrogate thereof on account of sickness; that in the month of December, 1876, the said Faulkner being such surrogate as aforesaid, became sick and unable to discharge the duties of his office; that at that time Daniel W. Noyes was the district attorney of said county, duly elected, qualified and acting as such, that the said Faulkner gave notice to the said Noyes as such district attorney, of his, the said Faulkner's inability to discharge the duties of the office of surrogate on account of sickness and requested him, the said Noyes, as such district attorney, to act as surrogate during such sickness; that said Noyes received said notice and immediately thereupon qualified

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himself to and did enter upon the discharge of the duties of surrogate of the said county as in and by act provided.

6. That afterwards and on the 29th day of January, in the year 1877, the said Daniel W. Noyes, acting as such surrogate as aforesaid, made an order in the proceedings commenced by the said surrogate as aforesaid, directing the said administrators to sell certain real estate of which the said Samuel Finley died seized, and which was liable for the payment of his debts, to which order and to the proceedings in said surrogate's court in reference thereto, now on file in the Surrogate's Court of said county, the said plaintiff craves leave to refer.

7. That pursuant to the said order the said administrators made sale of the real estate which, in and by said order, was directed to be sold, and brought the proceeds of such sale into the said Surrogate's Court; that on the 16th day of April, 1877, the said administrators paid over to the said Daniel W. Noyes, acting as such surrogate, the proceeds of the said sale, the sum of \$1,591.50; that the said money was paid to the said Daniel W. Noyes, as such surrogate as aforesaid, to be distributed to the creditors of said Samuel Finley, deceased, under the provisions of the statute in such case made and provided.

8. That the said Daniel W. Noyes, acting as such surrogate as aforesaid, on or about the 16th day of April, 1877, deposited the said money with one James J. Cone, a banker doing a banking business in Geneseo, in said county, and received from said Cone a certificate of deposit, payable at sight to the order of the said Daniel W. Noyes, acting surrogate as aforesaid, with interest at five per cent per annum.

9. That afterwards and on or about the 25th day of April, 1877, the said Faulkner recovered from his said sickness and resumed the duties of the office of surrogate of said county; that thereby the duties and offices of the said Noyes as acting surrogate of the said county ceased; that he, the said Noyes, delivered up the said office to the said Faulkner and all the books, papers and money in the hands of him, the said Noyes, pertaining thereto; that he, the said Noyes, indorsed, transferred and delivered to said Faulkner the said certificate of deposit so given by the said Cone as aforesaid; by means whereof and of the statute in such case made and provided, the said Faulkner, as such surrogate as aforesaid, and the said defendants, as his sureties on said bond, became responsible for the said money so received by the said Noyes, as aforesaid, and liable to pay the same to the said plaintiff as his successor in the said office of surrogate of said county as aforesaid.

10. That at the general election held in and for the State of New York on the 6th day of November, 1877, the said Samuel D. Faulkner, in his lifetime, since deceased, was again duly elected county judge of the county of Livingston, and that on the 1st day of January thereafter he entered upon the duties of the office to which he was elected, and that by virtue of the said election he became the surrogate of said county, and that he continued to exercise the duties of said office until the time of his decease, as hereinafter stated.

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11. That after his said second election and prior to his entering upon the duties of his office, he made, executed and caused to be filed in the clerk's office of Livingston county his official bond, that the said defendants James Faulkner and Henry J. Faulkner were his sureties on said bond; that the said bond is in the words and figures following, viz:

(Here insert bond.)

That said bond was duly executed according to the requirements of the statute in such case made and provided, was duly acknowledged by the parties executing the same and the said sureties justified as required by the statute, that the said bond so made, executed, acknowledged and justified was duly approved by the clerk of Livingston county on the 26th day of November, 1877, and was duly filed in his office and was afterwards and on the same day duly recorded in liber 4 of miscellaneous records of Livingston county, at page 476, as by reference to the said bond, acknowledgment, justification, approval, filing and recording will more fully appear.

12. That on the 19th day of August, 1878, the said Samuel D. Faulkner, being such surrogate as aforesaid, deceased; that at the time of his decease, the said Samuel D. Faulkner, as such surrogate as aforesaid, had in his hands the sum of \$1,212.90, all the moneys received from said treasurer on the 26th day of June, 1876, and the sum of \$1,591.50, received by the said Noyes, acting as surrogate as aforesaid, on the 16th day of April, 1877; that at the time of his decease no distribution had been made of the said money so received as aforesaid to the creditors of the estate of the said Samuel Finley, deceased.

13. That at the general election held in and for the State of New York, on the 4th day of November, 1878, the said relator, Edwin A. Nash, was duly elected to the office of county judge of the county of Livingston. That thereafter he duly qualified himself for said office, and duly executed and filed his official bond as required by statute, and on the 1st day of January, 1879, duly entered upon the discharge of the duties of said office, and still continues to exercise the same, and that by virtue of said election and qualification he became and still is the surrogate of Livingston county.

14. That by virtue of his said office of surrogate he became and is lawfully entitled to the sums of money above mentioned, so received by the said Samuel D. Faulkner in his lifetime as such surrogate aforesaid.

15. That being so lawfully entitled to the said money, the said relator made a statement in writing of the same in the form of an account and claim against the estate of the said Samuel D. Faulkner, deceased, duly certified by the said relator as such surrogate as aforesaid, and on the 27th day of September, 1879, caused the same to be presented to the said defendants (the said defendants being at the same time administrators of the estate of the said Samuel D. Faulkner, deceased) and demanded payment thereof; that the said defendants neglected and refused to pay said claim, and still neglect and refuse so to do.

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16. That by an order made at a Special Term of the Supreme Court, held at the court house in the city of Rochester on the last Monday of May, 1881, the said relator Edwin A. Nash, the surrogate of Livingston county, was authorized to prosecute the said defendants, the sureties on the said bond, in this court in the name of the People of the State of New York, stating in the process, pleadings and proceedings required in said action, that the same was brought on the relation of the said relator Edwin A. Nash, the surrogate of Livingston county, and that his action is brought in pursuance of the leave granted by the said order.

Wherefore the said plaintiff demands judgment against the said defendants, as such sureties upon said official bond as aforesaid, for the sum of \$1,212.90 and interest thereon from June 26, 1876, and the further sum of \$1,591.50 and interest thereon from April 16, 1877, besides costs.

JAMES WOOD,
Plaintiff's Attorney.

In *Lewison v. Hoffman*, 8 Misc. 583; 60 St. Rep. 582, *supra*, the authorities are collated as to how far reports made by an officer in the performance of his official duties, are evidence against his sureties. Among other cases cited is *Bissell v. Saxton*, 66 N. Y. 55, holding that in an action upon the bond of an officer, his official reports are not conclusive as against his sureties, but are admissions of the principal, subject to explanation. In *Board of Supervisors of Tompkins County v. Bristol*, 99 N. Y. 316, opinion Ruger, Ch. J., page 333, it is held that in an action against sureties for an alleged breach of such a bond, the official reports made during the term covered by them are a part of the *res gestæ*, and competent evidence not only of the facts affirmatively appearing therein but also of such other facts and circumstances bearing upon the liabilities of the sureties as are legitimately inferable therefrom. That a false report of an officer constitutes a violation of official duty and a breach of the bond, rendering sureties liable to the parties injured for such damages as are the legitimate consequence of the wrongful act, and that such a report may be received in evidence, not only for the purpose of showing such a breach, but as reflecting upon and illustrating the object and motives of other official acts of the treasurer, which are properly the subject of investigation. It is held in *Lewison v. Hoffman*, *supra*, that the main inquiry is whether the reports or declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the *res gestæ*, if so, they are held admissible, otherwise not.

CHAPTER XXVIII.

ACTION BY A PRIVATE PERSON FOR A PENALTY OR FORFEITURE.

AGE.

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ARTICLE I.

BY WHOM ACTION MAINTAINED, AND IN WHAT MANNER.

§§ 1893, 1894.

§ 1893. Action by persons specially aggrieved.

Where a penalty or forfeiture is given by a statute, to a person aggrieved by the act or omission of another, the person to whom it is given may, if it is pecuniary, maintain an action to recover the amount thereof; or, if it consists of the forfeiture of a chattel, he may maintain an action to recover the chattel, or its value, or other damages, as the case requires.

§ 1894. Action by common informer.

Where a penalty or forfeiture is given, by a statute, to any person who sues therefor, an action to recover it may be maintained by any person in his own name; but the action cannot be compromised or settled without the leave of the court in which it is brought.

Provision is made by chapter 974, Laws 1895, chapter 37, General Laws, for actions by persons or societies for recovery of penalties given by that act.

The general provisions of these sections do not supersede special provisions of the statutes authorizing actions for penalties in special cases, but they indicate the policy of the State that no one

 Art. 1. By Whom Action Maintained, and in What Manner.

shall use the name of the people of the State as a party plaintiff, except in pursuance of some law. *People of the State of New York v. Belknap*, 58 Hun, 241, 34 St. Rep. 239, 12 Supp. 143.

A common informer cannot sue for a penalty, unless such power is given by statute. *Seward v. Beach*, 29 Barb. 239. A party who first commences an action to recover a penalty acquires an interest in the penalty, which cannot be divested by any subsequent suit brought by any other common informer, though the latter be first prosecuted to judgment. *Beadleston v. Sprague*, 6 Johns. 101. A corporation cannot sue for penalties under a statute which provides for suits by any person in his own name. *Ancient City Sportsmen Club v. Miller*, 7 Lans. 412. See 32 How. 89.

If two or more persons* be jointly concerned in doing an act for which a penalty is imposed by statute, a joint action lies, but only one penalty is recoverable. *Warren v. Doolittle*, 5 Cow. 678. Where a penalty is given for the benefit of the persons upon whom the fraud is committed, the action must be brought in their names. *Thompson v. How*, 46 Barb. 287. Where the statute contemplates one offence, in the commission of which two classes of persons may be engaged, the penalty is one, and a complaint against both constitutes but one cause of action. *People v. Koll*, 3 Keyes, 236. Where the statute directs that on neglect of the overseers to prosecute, any person may prosecute in their name on giving security for costs, the defendant cannot object that the statutory time has not elapsed or security been given; these objections can only be taken by the overseers. *Thayer v. Lewis*, 4 Den. 269. Where a penalty is fixed between certain limits, the jury may be governed by the circumstances, and by the public necessity, in fixing the amount. Where judgment is given for penalty for breach of an ordinance, the alternative sentence must strictly conform to the powers conferred by the statute. *Merke v. Rochester*, 13 Hun, 157. In an action for a penalty for failing to attend as a witness, the plaintiff must show that the witness was material and that damages resulted from his non-attendance. *Carrington v. Hutson*, 28 Hun, 371.

In an action for a penalty for watering milk, a test of the defendant's milk, made a year after the alleged violation, is not evidence. *Stearns v. Ingraham*, 1 T. & C. 218. As to what is sufficient evidence to convict of the offence of taking down or defacing a sheriff's notice of sale, see *Murphy v. Tripp*, 44 Barb.

ART. 2. Summons, How Indorsed and Served.

189. Ignorance of the law is no defence in an action on a penal statute. *Hyde v. Melvin*, 11 Johns. 521; *Board of Health v. Knoll*, 70 N. Y. 530. A penalty must be created by express words, it cannot be raised by implication. *Jones v. Estis*, 2 Johns. 379. An action for a penalty is a civil action, whether brought by a municipal corporation or an individual. *City of Buffalo v. Schliefer*, 25 Hun, 275. The claim upon which an action to recover a statute penalty is based is not a cause of action arising upon contract. *Abbott v. N. Y. C. R. R. Co.* 1 Sheld. 278. The general words of a penal statute are to be restrained for the benefit of him against whom it is inflicted. *Hall v. Siegel*, 7 Lans. 206, affirmed, 53 N. Y. 607. But one penalty for exacting excessive fares can be recovered in the same action. *Bissell v. N. Y. C. R. R. Co.* 67 Barb. 385. But a party aggrieved is not limited to one penalty, but may recover the same for each and every offence. *Suydam v. Smith*, 52 N. Y. 383. The provisions of the statute protecting an act done in conformity with a construction of a statute given by the Supreme Court, applies only to an action to enforce a penalty or forfeiture, and was not intended to relieve a party from the consequences of acts which violate private rights. *Chenango Bridge Co. v. Paige*, 83 N. Y. 178. In an action for a penalty for selling lottery tickets the complaint must set forth the date of sale and the amounts. *Roddiger v. Simmons*, 14 Abb. (N. S.) 256. An action to recover penalties for bringing watered milk to a cheese factory may be maintained by the treasurer of the association against a member of it. *Bridenbecker v. Hoard*, 32 How. 289.

ARTICLE II.

SUMMONS, HOW INDORSED AND SERVED. §§ 1897, 1895.

§ 1897. Indorsement upon summons.

In an action to recover a penalty or forfeiture, given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered, in the following form: "According to the provisions of," etc.; adding such a description of the statute, as will identify it with convenient certainty, and also specifying the section, if penalties or forfeitures are given, in different sections thereof, for different acts or omissions.

§ 1895. Id.; service of summons.

The summons in an action, brought as prescribed in the last section, can be served only by an officer authorized by law to collect an execution, issued out of

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the same court. The summons, when issued, cannot be countermanded by the plaintiff before the service thereof, and, immediately after it has been served, the officer who served it must file it, with his certificate of service, in the office of the clerk, or deliver it, with a like certificate, to the magistrate by whom it was issued, as the case requires.

If the complaint annexed to the summons, and served with it, contains a reference to the statute on which the action is founded, it is a compliance with the statute. *McKee v. Sweeney*, 66 How. 447; *Thayer v. Lewis*, 4 Den. 469; *Cox v. N. Y. C. R. R. Co.* 61 Barb. 615. *Contra*, *Brooks v. Schoonmaker*, 24 Hun, 553. Unless the summons is indorsed, the court gets no jurisdiction. *Bissell v. N. Y. C. R. R. Co.* 67 Barb. 386. But an appearance is a waiver. *Vernon v. Hopkins*, 9 Civ. Pro. R. 257. Where the statute creates a forfeiture, but does not give the action, it is not necessary to indorse a reference to it upon the summons. *Sprague v. Irwin*, 27 How. 51. As to what is a sufficient indorsement upon a justice's summons, see *Andrews v. Harrington*, 19 Barb. 343; *Marselis v. Scaman*, 21 Barb. 319; *Perry v. Tynen*, 22 Barb. 137; *Commissioners of Excise v. Doherty*, 16 How. 46. In an action for willful trespass upon land, the summons need not be indorsed with a reference to the statute, though treble damages are claimed. *Sprague v. Irwin*, 27 How. 51. In an action brought to recover a penalty or forfeiture given by a city ordinance, a general reference to the ordinance must be indorsed upon the summons—it is not necessary, it should be printed verbatim; such a reference as would enable a party to determine for what offence he has been sued, and what penalty it is charged he has incurred, is sufficient. *Mayor v. Eisler*, 2 Civ. Pro. R. 125. It seems that proof of service of a summons in an action to recover a penalty or forfeiture is not proof that the summons served had indorsed upon it a general reference to the statute under which the action was brought, as required by this section, notwithstanding the original summons had been so indorsed. *People v. Walters*, 7 Civ. Pro. R. 406. The object of the requirement of the statute is to give notice to the person sued of the object of the action, and for what, generally, a recovery is sought. *Avery v. Slack*, 17 Wend. 86; *Sawyer v. Schoonmaker*, 8 How. 198. Section 1897 applies only to actions by private persons, and not to an action brought by an officer in his official capacity. *Townsend v. Hopkins*, 9 Civ. Pro. R. 257. An indorsement should so refer to the statute as to identify it with convenient certainty, and

ART. 2. Summons, How Indorsed and Served.

specify the sections, if penalties or forfeitures are given in different sections thereof, for different acts or omissions. *Young v. Gregg*, 9 Civ. Pro. R. 262. A judgment taken upon a summons without indorsement is not void, but voidable, and may be reversed on appeal; until so reversed it is valid. *Spoor v. Cornell*, 12 Civ. Pro. R. 319.

Where the summons is served with the complaint, no indorsement need be made on the summons. *Kee v. McSweeney*, 66 How. 447, 15 Abb. N. C. 229. Reference to the statute giving the penalty and not to an amendatory act giving the plaintiff his right to sue, is sufficient. *Prussia v. Guenther*, 16 Abb. N. C. 230. Appearance is a waiver of indorsement. *Vernon v. Palmer*, 48 N. Y. Supr. 231; *Bissell v. N. Y. C. & H. R. R. Co.* 67 Barb. 385.

In order that the service of a summons may be set aside because there is no reference thereon to the statute giving the penalty, the moving affidavit must show what the complaint is or the nature of some proceeding which would legally determine the cause of action. *Delisser v. N. Y., N. H. etc. Co.* 39 St. Rep. 242, 20 Civ. Pro. R. 312, 14 N. Y. Supp. 382. Section 1897 is general and applies to all actions including an action brought by the people to recover penalties. *People of the State of New York v. O'Neil*, 54 Hun, 610, 28 St. Rep. 37.

Under § 1897 it is sufficient if an ordinance alleged to be violated is particularly mentioned and the substances thereof endorsed on the summons. *Mayor v. Wood*, 6 N. Y. Supp. 657. The failure to comply with § 1897 is fatal to the validity of the service of the summons and makes the court without jurisdiction over the person of the defendant. Such defect, since it does not appear on the face of the summons, is not remedied by defendant's voluntary appearance. *Lassen v. Aronson*, 29 Abb. N. C. 114 (referring to Abb. New Practice & Forms, 619 and notes); S. C. 21 N. Y. Supp. 452.

A discontinuance is not a compounding of a penalty within the statute. *Haskins v. Newcomb*, 2 Johns. 405. It is in the discretion of the court to grant leave to compound the action upon terms. *Castell v. Allen*, 10 Johns. 118. The plaintiff may discharge the judgment by receiving the amount of the penalty, but not as to the people's moiety without actual payment. *Castell v. Allen*, 10 Johns. 118; *Minton v. Woodworth*, 11 Johns. 474. In an action brought under chapter 185, Laws of 1857, which pro-

Art. 3. Pleadings.

vides that any railroad charging more than the legal fare shall forfeit \$50, which sum may be recovered, together with the excess so received, by the party paying the same, § 1895 does not apply. *Quade v. N. Y., N. H. & H. R. R. Co.* 39 St. Rep. 157; S. C. 14 Supp. 875.

In *Ahner v. N. Y., N. H. & H. R. R. Co.* 20 Civ. Pro. R. 318, it was held that the objection that the service of the summons was not made by the person designated in § 1895, is founded on a mere irregularity and should be taken by motion before the service of answer, and in *Burke v. N. Y., N. H. & H. R. R. Co.* 15 N. Y. Supp. 148, it is held that it is not proper matter to set up by way of answer, and a defence to that effect was stricken out.

ARTICLE III.

PLEADINGS.

In an action for breach of a municipal ordinance, the particular ordinance violated should be stated in the complaint. *People v. Justices, etc.* 12 Hun, 65. In an action under a penal statute, the plaintiff must state specially the cause of action arising under it. *Cole v. Smith*, 4 Johns. 193; *People v. Brooks*, 4 Den. 469. Where an informer can only sue after a specified time, he must allege in the complaint that such time has expired. *Morrell v. Fuller*, 7 Johns. 402. See *Barlow v. Pease*, 5 Hun, 564. It is not necessary to refer to the statute prescribing the duty for which a penalty is inflicted, but only to that which inflicts the penalty. *Morris v. People*, 3 Den. 387. It is said that it is not indispensable to plead that the offence is against the form of the statute, the offence may be described generally in the words of the statute. *People v. Bartow*, 6 Cow. 290. It is held in *Morhouse v. Crilley*, 8 How. 431, that the Code abrogated the provisions of the Revised Statutes relating to declaring upon a penal statute. *Contra, People v. Bennett*, 5 Abb. 384. And see *Abbott v. N. Y. C. R. R. Co.* 12 Abb. (N. S.) 465. It seems that the provisions of 2 R. S. 480, § 1, authorizing a short mode of pleading in penal actions by referring simply to the statute on which the action is founded, is repealed by the Code of Procedure, which requires the facts constituting every cause of action to be alleged. A complaint upon a municipal ordinance, for depositing refuse in a harbor or channel, need not allege that the common council adjudged the place a harbor within the meaning of the statute under

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which they acted. *City of Ogdensburg v. Lyon*, 7 Lans. 215. In an action against a railroad company for collecting excessive fare, it is not necessary that the complaint should allege the various enactments consolidating several railroad companies; it is enough to allege that defendant had been duly organized, was entitled to demand and receive a certain rate of fare, and had demanded and received a higher rate. *Nellis v. N. Y. C. R. R. Co.* 30 N. Y. 505. In an action for a penalty for non-compliance with the insurance laws, the complaint need not set forth the particular statute violated. Where a statute, on which is founded a municipal ordinance in violation of which an act is alleged to have been done, is not specifically referred to in the pleading, the defect, if it is one, may be disregarded, if no objection is made till the trial, and the adverse party is not surprised. *Beman v. Tugnot*, 5 Sandf. 153. In a statutory action, the complaint must show that every requisite to the cause of action exists. *Austin v. Goodrich*, 49 N. Y. 266.

It seems that under the Code of Civil Procedure, it is not necessary that a complaint in an action for a penalty should refer specifically to the statute. *Shroeder v. Becker*, 22 Week. Dig. 261. A complaint for violation of the excise law under chapter 628, Laws of 1857, should state the names of the persons to whom the several illegal sales of liquor were made, or excuse be given for not so doing, and in that case such circumstances should be stated as will to some extent identify the transaction complained of. A complaint in such an action is not obnoxious to a motion to make it more definite and certain if it refers to the act under which the action was brought, although the particular section thereof giving the penalty is not pointed out. *Kee v. McSweeney*, 66 How. 447; 15 Abb. N. C. 229. Where a complaint for violation of the excise law charged that defendant sold liquors without a license on each day within the particular days mentioned, and defendant did not demand a bill of particulars or require the complaint to be made more definite and certain, it was held proof was properly received showing violation of the law upon each day mentioned within the period set out in the complaint. *Commissioners of Excise of Auburn v. Burtis*, 20 Week. Dig. 272, affirmed on other grounds, 103 N. Y. 136. A complaint in an action for excise penalties which alleges the official character of plaintiff as overseer of the poor, and that on a day

Art. 4. When Recovery Had and to What Extent.

specified defendant, without license, sold in the town spirituous liquors in quantity less than five gallons, and thus became indebted to plaintiff in penalty of fifty dollars, pursuant to the statute in such case made and provided, is sufficient; if the summons is indorsed so as to show that an action is under a specified section of the statute. *Prussia v. Guenther*, 16 Abb. N. C. 230. The provisions of the statute respecting indorsement of the summons in an action to recover a penalty do not apply to the complaint, but the sufficiency of the complaint is to be contested by the ordinary rules of pleading. *Ripley v. McCann*, 34 Hun, 102. Where the form of complaint restricted the nature of an action for a penalty so that there could be no recovery, an amendment was allowed upon payment of the costs of the demurrer in the particular case, so as to present the causes of action at common law. *Langdon v. New York, Lake Erie, etc. R. R. Co.* 58 Hun, 122; 33 St. Rep. 907; 11 Supp. 514. To sustain an action for a penalty, the proof must clearly establish a violation of the statute by defendant. *Higgins v. Dakin*, 86 Hun, 461, 33 Supp. 890, 67 St. Rep. 637.

ARTICLE IV.

WHEN RECOVERY HAD AND TO WHAT EXTENT. §§ 1896, 1898.

§ 1896. *Id.*; when not barred by a collusive recovery.

In an action to recover a penalty or forfeiture, given by a statute, brought by any person other than the person aggrieved, or a public officer, the plaintiff may recover, notwithstanding the recovery of a judgment, for or against the defendant, in an action brought therefor by another person, if he establishes that the former judgment was recovered collusively and fraudulently.

§ 1898. When part of a penalty may be recovered.

Where a statute gives a pecuniary penalty or forfeiture, not exceeding a specified sum, an action may be maintained to recover the sum specified; and the court, jury, or referee, by which or by whom the issues of fact are tried, or, where judgment is taken by default for failure to appear or plead, the damages are ascertained, may award to the plaintiff the whole sum, or such a part thereof, as he or it deems proportionate to the offence.

Where a penalty is fixed between certain limits, the jury may be governed by circumstances and the public necessity in fixing the amount. *Lammond v. Voland*, 14 Hun, 263.

Section 1898 applies to all actions whether brought by the people and public officer, or a private person. The language is general, and the intent to apply to all actions for penalties by whoever brought, is apparent. *People v. O'Neil*, 28 St. Rep. 37.

CHAPTER XXIX.

CERTAIN ACTIONS TO RECOVER DAMAGES FOR WRONGS.

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ARTICLE I.

CIVIL AND CRIMINAL PROSECUTIONS NOT MERGED. § 1899.

§ 1899. Civil and criminal prosecutions not merged.

Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other.

It was held before the present Code, in *Gordon v. Hostetter*, 37 N. Y. 99, that the civil remedy of a plaintiff is neither merged in an alleged felony nor suspended until the conviction of the offender, also in *Newton v. Porter*, 5 Lans. 416, stating the rule as stated in the section to have been well settled since the decision of *Hoffman v. Carow*, in the Court of Errors, reported 22 Wend. 285; *Wise v. Terpenning*, 8 N. Y. Leg. Obs. 153.

This section is applied in *Kain v. Larkin*, 56 Hun. 79, 29 St. Rep. 643.

Art. 2. Suing in Name of Another. Art. 3. Causing Death by Negligence.

ARTICLE II.

ACTION FOR SUING IN THE NAME OF ANOTHER. §§ 1900, 1901.

§ 1900. **Action for suing, etc., in name of another. Made also a misdemeanor.**

If a person, vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court, of record, or not of record, or a special proceeding before a judge or a justice of the peace; or takes, or causes to be taken, any proceeding, in the course of an action or special proceeding in such a court, or before such an officer, either before or after judgment or other final determination; an action, to recover damages therefor may be maintained against him, by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment, not exceeding six months.

§ 1901. **Treble and other increased damages to be recovered.**

In an action brought by the adverse party, as prescribed in the last section, the plaintiff, if he recovers final judgment, is entitled to recover treble damages. In an action brought by the person whose name was used, as prescribed in the last section, the plaintiff is entitled to recover his actual damages, and two hundred and fifty dollars in addition thereto.

An attorney who brings a suit in the name of a dissolved and non-existent corporation should be required to pay the costs of the action notwithstanding he acted in good faith and has himself been imposed on by persons asserting that they represent such a corporation. *Attleboro National Bank v. Wendell*, 22 Civ. Pro. R. 225.

ARTICLE III.

ACTION FOR CAUSING DEATH BY NEGLIGENCE.* §§ 1902, 1903, 1904, 1905.

SUB. I. THE RIGHT OF ACTION, AND LIMITATION THEREOF. SEC. 1902.

2. BY AND AGAINST WHOM ACTION MAINTAINED.
3. PLEADINGS.
4. EVIDENCE.
5. GENERAL PROVISIONS RELATIVE TO THE ACTION.
6. DAMAGES, AND FOR WHOSE BENEFIT AWARDED. SECS. 1903, 1904, 1905.

SUB. I. THE RIGHT OF ACTION, AND LIMITATION THEREOF.

§ 1902.

§ 1902. **Action for causing death by negligence, etc.**

The executor or administrator of a decedent, who has left him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages

*This subject is treated in a work entitled "Death by Wrongful Act," by Francis B. Tiffany, which gives references to the statutes of the different states

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for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death.

The original act upon which this section is founded was first passed in 1847, following what was known as Lord Campbell's act, passed in England in 1846. That act was entitled "An act for compensating the families of persons killed by accident." Since that time statutes have been enacted in all the States granting like remedies to families of persons killed by wrongful act, neglect or default. At common law the right of action for an injury to the person abated on the death of the party injured, and where death resulted, whether instantaneously or not, from such an injury, no action could be maintained by the personal representatives of the party injured to recover damages suffered by the decedent. *Tiffany on Death by Wrongful Act*, § 1. Lord Ellenborough held, in *Baker v. Bolton*, 1 Campb. 493, that "in a civil court the death of a human being could not be complained of as an injury." This was in 1808, and it was not until in 1846 that the first act was passed granting remedy in such cases. The contrary rule seems to have been held in *Ford v. Monroe*, 20 Wend. 210, decided in 1838, but this case was overruled in *Green v. Hudson River Railroad Co.* 2 Keyes, 294; s. c. 2 Abb. Dec. 277, affirming 28 Barb. 9, and 16 How. 230. Statutes of this character are not simply remedial, but create a new cause of action in favor of the personal representatives of the deceased, which is wholly distinct from and not a revivor of the cause of action which, if he had survived, he would have for his bodily injury. *Whitford v. Panama R. R. Co.* 23 N. Y. 465, and the statute giving an action for damages does not apply where the injury is not committed in this State, but in a foreign country where no such law exists. *Marshall v. Sherman*, 148 N. Y. 25, citing *Whitford v. Panama R. R. Co.* 23 N. Y. 465, *supra*. The action is given not for the purpose of general administration, but for the exclusive use of

upon this subject and also authorities. The subject is necessarily treated in all works on negligence including among others, Shearman and Redfield on the Law of Negligence, Ray's Negligence of Imposed Duties, Buswell's Law of Personal Injuries, Black on Proof and Pleading in Accident Cases, Booth on Street Railways, Jones on Negligence of Municipal Corporations, Patterson's Railway Accident Law, Beach on Contributory Negligence, McKinney on Fellow Servants, Bailey's Master's Liabilities for Injuries to Servant, Thomas on Negligence, giving rules, decisions and opinions, and Leavitt on Negligence, the latter having special reference to the law of negligence in this State.

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specified beneficiaries. *Hegerich v. Keddie*, 99 N. Y. 268. The distinguishing features of this action are, first, that it may be maintained whenever death is caused by wrongful act, neglect or default, such as would, if death had not ensued, have entitled the party injured to maintain an action; second, it is for the exclusive benefit of certain designated members of the family of the deceased; third, damages recoverable are such as result to the beneficiaries from the death. *Tiffany on Death by Wrongful Act*, § 22.

The right of action for causing death by negligence exists only by virtue of the statute. It did not exist at common law. *Crowley v. Panama R. R. Co.* 30 Barb. 99; *Mahler v. Norwich, etc. Co.* 35 N. Y. 352; *McDonald v. Mallory*, 77 N. Y. 546; *Green v. Hudson*, 2 Keyes, 294; *Debevoise v. N. Y., L. E. etc. R. R. Co.* 98 N. Y. 377. The remedy is an extraordinary one, unknown to the common law, created by statute for damages or injuries also created by statute, for in a legal or judicial sense damages or injuries for which there is no legal redress or remedy are not damages or injuries. Those acts which create the remedy for the benefit of the widow and next of kin also create the wrong as to them. *Beach v. Bay State, etc. Co.* 30 Barb. 433. The act is to be liberally construed. *Oldfield v. N. Y. C. & H. R. R. Co.* 3 E. D. Smith, 103; *Beach v. Bay State, etc. Co.* 30 Barb. 433. The statute does not give a remedy for injuries received without the State and resulting in death. *Whitford v. Panama R. R. Co.* 23 N. Y. 465; *Crowley v. Panama R. R. Co.* 30 Barb. 99; *Vanderwerken v. N. Y. & H. R. R. Co.* 6 Abb. 239; *Mahler v. Norwich, etc. Co.* 45 Barb. 226, reversed, 35 N. Y. 352. But the rule is otherwise where the death occurs on the high seas, on board a vessel hailing from and registered in a port within the State, and at the time employed by the owners in their own business. *McDonald v. Mallory*, 77 N. Y. 546. An action is maintainable in this State by the personal representatives of one whose death resulted from an injury received in another State, through the negligence of defendant, where it appears the laws of that State are similar to the laws of this State giving to the personal representatives a right of action. In such cases it is not essential that statutes should be precisely the same, but the existence of such a statute should be proved. The action may be maintained by an administrator appointed in this State. *Leonard v. Columbia,*

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etc. Co. 84 N. Y. 48; approved, *Derrick v. R. R. Co.* 13 Otto, 21. The statute has no extra-territorial effect. *Deboveise v. N. Y., L. E. etc. Co.* 98 N. Y. 377. The statute applies, whether the death was instantaneous or where it was consequential. The action is equally maintainable in both cases. *Brown v. Buffalo, etc. R. R. Co.* 22 N. Y. 191. Nor is it material that the act causing death was not intentional. *Baker v. Bailey*, 16 Barb. 54. The act providing for the protection of human life at public bathing places does not indicate an intention on the part of the Legislature to impose a liability where the death was caused by the negligence of the person drowned. *Nugent v. Vanderveer*, 39 Hun, 322.

Section 1902 is a remedial statute and should be so construed as to give rather than withhold the remedy intended to be provided. There is nothing from which it can be inferred that the right of action was only intended to be given in case the person killed was a citizen of the State of New York or left property therein. The section is not covered by the express terms of § 2702, but by the broad powers conferred by the latter section it is evident that ancillary representatives are given every right of action conferred upon executors or administrators, unless specially excepted. *Lang v. Houston St. R. R. Co.* 75 Hun, 151, 27 N. Y. Supp. 90.

In *Kane v. Larkin*, 56 Hun, 79, 29 St. Rep. 643, § 1902 was held applicable to an action brought by an administratrix against a person who killed the intestate. Under this statute the burden is upon the plaintiff to establish as part of his case and by competent evidence, that a wrongful act, neglect or default on the part of defendant was the actual cause of death. *Schoen v. Dry Dock, etc. R. R. Co.* 31 St. Rep. 400. An action under this section to recover damages for the benefit of the next of kin, is not an action relating to decedent's estate under §§ 1825 and 1826. *In re Jansen's Estate*, 9 N. Y. Supp. 451.

In an action under this section, complaint must allege that the intestate left him surviving some person or persons who would be entitled to the benefit of the recovery, if one should be had, and a complaint which does not contain an allegation that he left either a widow or next of kin, is insufficient and demurrable. *Kenney v. N. Y. C. R. R. Co.* 15 Civ. Pro. R. 347. The personal representatives of a deceased person, whose death is alleged to have been caused by negligence of the officers of the State, in the

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use and management of the canals, are entitled to the allowance of the claim where, in case the negligent act causing the death had been chargeable to a natural person or corporation, an action could have been maintained under this section. *Bowen v. State of New York*, 108 N. Y. 166. Under this section a charity patient has precisely the same right of action for malpractice as one who pays for attendance; but it seems that a public charitable hospital is not liable for injuries sustained by an inmate from the actual negligence of a medical attendant if it is shown that the institution exercised due care in the selection. *Harris v. Woman's Hospital*, 27 Abb. N. C. 37, 14 Supp. 881.

An action under the statute of a foreign State to recover for death by negligence can only be maintained in this State by such parties as are designated by the statute giving the right of action; *held*, that an action under the statute of Pennsylvania was properly brought in this State in the name of the widow, she being the proper party under the statutes of that State. *Wooden v. Western New York, etc. R. R. Co.* 35 St. Rep. 685, 12 N. Y. Supp. 908. Where an express messenger was killed while on defendant's train, the express company and the defendant having a contract releasing the railroad company from liability for any damage done to the agents of the express company, whether in their employ as messengers or otherwise, it was held that, in the absence of evidence of an agreement on the part of the deceased or of knowledge on his part of this agreement by his employer, the express company could not waive the right of the intestate to protection against negligent wrong at the hands of the defendant, or discharge the defendant from cause of action which belonged only to the intestate or his personal representative. *Kenny v. N. Y. C. & H. R. R. Co.* 54 Hun, 143. On appeal, 125 N. Y. 422, it was held that the contract might be read not necessarily as releasing or preventing an action by employes of the express company against defendant for damages for injuries received while on the road, but as an agreement to indemnify defendant in the event of such an action and so that plaintiff was entitled to recover, and the decision in that court is placed upon that ground.

Brewer v. N. Y., L. E. & W. R. R. Co. 124 N. Y. 59, holds the rule to be that a person entering into a contract of service with one employer may not without his knowledge or assent be made to assume the hazards of a service conducted by another and in

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which he is not engaged, and so be personally subjected to the consequences of the negligence of the latter without remedy against him. This case is referred to in 125 N. Y. at page 425.

The action must be brought within two years. *Bonnell v. Jewett*, 24 Hun, 524. This rule is applicable to a foreign corporation. *Londriggan v. N. Y. & H. R. R. Co.* 5 Civ. Pro. R. 76. The fact that the death did not occur within a year and a day from the time of the act does not affect the case, for the rule as to death within a year and a day does not apply in civil actions. *Schlichting v. Wintgen*, 25 Hun, 626.

SUB. 2. BY AND AGAINST WHOM ACTION MAINTAINED.

The action lies in every case where the deceased could have maintained an action had he survived. *Keller v. N. Y. C. R. R. Co.* (Court of Appeals, 1861), 24 How. 172. The only condition on which the right of the administrator to sue depends is the common-law right of the injured person to maintain the action if he were living. It is not required that the person injured should be a husband, father or protector, though the Legislature in passing the act was doubtless influenced by the evident justice of compelling the wrong-doers to compensate families dependent in a greater or less degree for support on the deceased. *Quin v. Moore*, 15 N. Y. 432. See *Green v. H. R. R. Co.* 18 How. 323, affirmed, 31 Barb. 260. Where one injured recovers therefor in his lifetime, his personal representatives cannot also maintain the action under the statute. It was not intended to impose a double liability. *Littlewood v. Mayor*, 89 N. Y. 24, overruling 25 Hun, 626. The action could not be maintained by the husband for causing the death of a married woman, as the law stood previous to 1870. *Green v. H. R. R. Co.* 2 Keyes, 294; *Drake v. Gilmore*, 52 N. Y. 389. Where he sued as her administrator, as the statute stood in 1861, he could not recover for the value of her services to him. *Dickens v. N. Y. C. R. R. Co.* 23 N. Y. 158. The fact that children of a person killed are of full age and living away from home and supporting themselves, will not alone prevent a recovery. *Lockwood v. N. Y., L. E. & W. R. R. Co.* 98 N. Y. 523. By personal representatives the statute means executors or administrators. *Safford v. Drew*, 3 Duer, 627; *Lee v. Dill*, 39 Barb. 516; *Tilley v. H. R. R. Co.* 24 N. Y. 471. The father may

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sue as administrator of his infant son. *McMahon v. Mayor*, 33 N. Y. 642.

Natural persons as well as corporations are liable under the statute. *Baker v. Bailey*, 16 Barb. 54. One who has leased a ferry to another person for a definite period, where the same is being conducted independently of the lessor, is not liable for the wrongful act or negligence of a servant of the lessee. *Norton v. Wiswall*, 26 Barb. 618. Where a master directed a servant to do a piece of work and the servant employed another, who executed it negligently and carelessly, the master was held liable. *Althorff v. Wolf*, 22 N. Y. 355. An employer is not liable for the death of one servant caused by the negligence of another servant. *Rounds v. D., L. & W. R. R. Co.* 64 N. Y. 129; *Sherman v. R. & S. R. R. Co.* 17 N. Y. 153; *Malone v. Hathaway*, 64 N. Y. 5. The master of a vessel was held liable for negligence in causing the death of a child, where the steward left a poisonous substance where the child drank it. *Ryall v. Kennedy*, 67 N. Y. 379. The receiver of an insolvent railroad company operating the road, in the absence of evidence that he assumed to act other than as such officer of the court, is not liable personally on an action for negligence causing the death of a passenger, where no personal negligence is imputed to him; *Cardot v. Barney*, 63 N. Y. 281; but where such receiver assumes the management of other property, over which the court has no control, he is responsible individually for its careful and proper management; *Kain v. Smith*, 80 N. Y. 458. (See "Receivers" for further authorities.) Held, in *Yertore v. Wiswall*, 16 How. 8, that the action could be maintained against the personal representatives of the wrong-doer for the enforcement of a statutory right of property, and this case was followed in *Hegerich v. Keddle*, 32 Hun, 142, but the latter case was reversed, 99 N. Y. 258, holding that the action abated and could not be maintained against the personal representatives of the wrong-doer, and 16 How. 8, *supra*, overruled. Under Laws 1870, chapter 321, which opened the door to claims against the State, founded upon its negligence, the plaintiff, as administrator of her deceased husband, has a cause of action against the State, notwithstanding the omission in § 1902 (giving to administratrix such right) to include such actions against the State. *Bowen v. State of New York*, 13 St. Rep. 134.

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SUB. 3. PLEADINGS.

In an action for damages caused by defendant's negligence, a general averment in the complaint of negligence is sufficient to admit proof of the special circumstances constituting it. *Oldfield v. N. Y. & H. R. R. Co.* 14 N. Y. 310. Degrees of negligence are matters of proof, not of averment, and a general allegation of negligence, want of skill, etc., is sufficient, in an action for negligence, whether the defendant is liable for ordinary or gross negligence. *Nolton v. Western R. R. Co.* 15 N. Y. 444. Freedom from negligence need not be averred by plaintiff; *Hackford v. N. Y. C. R. R. Co.* 13 Abb. (N. S.) 518; *Wolfe v. Supervisors*, 19 How. 370; *Richards v. Westcott*, 2 Bosw. 589; *Johnson v. H. R. R. Co.* 20 N. Y. 65; and this rule is not changed by the decisions in *Reynolds v. N. Y. C. & H. R. R. Co.* 58 N. Y. 248, and *Urquhart v. City of Ogdensburg*, 23 Hun, 75. Westbrook, J., said, in latter case: "An averment in the complaint that the negligence of the defendant was the cause of the injury is equivalent to an allegation that it was the sole cause. To establish such an allegation, the absence of contributory negligence must be shown, as the cases now hold, but the pleadings cover the whole ground." To the same effect, see *Lee v. Troy Citizens' Gas-light Co.* 98 N. Y. 115.

In an action by the personal representatives the complaint need not state the names of the next of kin. *Keller v. N. Y. C. R. R. Co.* 24 How. 172. The complaint need not refer to the statute, but should state a time when the injury occurred, and state all the facts requisite to bring the case within the statute. *Brown v. Harmon*, 21 Barb. 508. A complaint is sufficient which alleges that the death was caused by the wrongful act, neglect or default of defendant; it is not necessary to aver want of contributory negligence. *Melhado v. Poughkeepsie Transportation Co.* 27 Hun, 90. An allegation that plaintiff was put to cost and expense for medical attendance, funeral and other expense is sufficient. *Roeder v. Ormsley*, 22 How. 270. An allegation that defendants, by the negligence of themselves and their servants, caused the injury is a sufficient allegation to enable plaintiff to show the defective construction of the car which caused the injury, as well as carelessness of the driver. *Oldfield v. N. Y. C. R. R. Co.* 14 N. Y. 310. An allegation that defendants' servant, driving their horse

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car, so negligently and carelessly managed his team that the horse knocked her down and injured her, is sufficiently definite and certain. *Agnew v. Brooklyn, etc. Co.* 20 Abb. N. C. 235. A complaint in a husband's action for causing the wife's death, which shows that she did not die till several days after the first injury, is sufficient, since it shows a period during which he was deprived of her services. *Phillippi v. Wolf*, 14 Abb. (N. S.) 196. In an action for negligence, *held*, not necessary to plead a public statute creating the duty, the omission of which constituted the negligence complained of. *Brennan v. Lachat*, 6 St. Rep. 278.

It is not necessary to allege that damages have been sustained by plaintiff by reason of the negligence of the defendant or by reason of the death of the intestate, since the law supplies the necessary implication justifying the award of nominal damages. The court expressed no opinion as to damages which depend upon proof as to whether they must be alleged in the complaint. *Kenney v. New York Central & Hudson R. R. Co.* 49 Hun, 535.

In an action for negligence causing death, the defendant need not allege in the answer that the death occurred in another State; the plaintiff must allege and prove that the death occurred within this State, or within a State having a similar statute in such case. *Debevoise v. N. Y. & L. E. R. R. Co.* 98 N. Y. 377. A defendant cannot plead his own previous ignorance as an excuse for his inability to perform a distinct and affirmative duty. *Bills v. N. Y. C. R. R. Co.* 84 N. Y. 5. A foreign corporation sued here may plead the statute of limitations prescribed by the section. Section 414 does not apply. *Londriggen v. N. H. R. R. Co.* 12 Abb. N. C. 273.

SUB. 4. EVIDENCE.

No proof of damages resulting to the plaintiff or next of kin is necessary to sustain an action under the statute, by the administrator of the deceased, for injuries to the person. *Keller v. N. Y. C. R. R. Co.* 24 How. 172. The negligence of the defendant must be affirmatively established. *Massoth v. D. & H. Canal Co.* 6 Hun, 314; S. C. 64 N. Y. 524; *Cleveland v. N. Y. S. Co.* 68 N. Y. 306, reversing 5 Hun, 523; *DeGraff v. N. Y. C. R. R. Co.* 76 N. Y. 125; *Barringer v. N. Y. C. R. R. Co.* 18 Hun, 398; *Painton v. Northern, etc. R. R. Co.* 83 N. Y. 7; *Derrenbacher v. Lehigh, etc. Co.* 87 N. Y. 636. The plaintiff is bound to show affirmatively

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that the deceased did not contribute to the result, and that defendant's negligence was the sole cause; *Hart v. Hudson River Bridge Co.* 84 N. Y. 56; *Riceman v. Havemeyer*, 84 N. Y. 647; *Hale v. Smith*, 78 N. Y. 480; *Glendenning v. Sharpe*, 22 Hun, 78; and any degree of contributory negligence which immediately contributed to the injury is a complete defence; *Gray v. Second Ave. etc. R. R. Co.* 65 N. Y. 561; *Keese v. N. Y. etc. R. R. Co.* 67 Barb. 205; but otherwise if the negligence in no way contributed to the injury; *Hanks v. Winans*, 74 N. Y. 609; *Wasmer v. D., L. & W. R. R. Co.* 80 N. Y. 212; and the question of contributory negligence, where the evidence is conflicting, or different inferences may be drawn from it, must always be submitted to the jury. *Belton v. Baxter*, 58 N. Y. 411; *Saltar v. Utica, etc. R. R. Co.* 59 N. Y. 631; *Thurber v. R. R. Co.* 60 N. Y. 326; *Massoth v. D. & H. R. R. Co.* 64 N. Y. 524. The absence of contributory negligence may be shown by attending circumstances as well as by direct testimony. *Tolman v. Syracuse R. R. Co.* 98 N. Y. 198; *Nowell v. The Mayor*, 52 Super. Ct. 382.

Where the action is such as in the ordinary course of things does not happen, the fact itself raises a presumption of negligence. *Lyons v. Rosenthal*, 11 Hun, 46; *Green v. Bonta*, 48 Super. Ct. 156. It is not necessary to give positive and direct proof of defendant's negligence; proof of circumstances from which it may be fairly inferred is sufficient. *Jones v. N. Y. C. R. R. Co.* 62 How. 450; *Hart v. Hudson River Bridge Co.* 80 N. Y. 622. The fact that a passenger vessel deviated from her voyage and was wrecked raises a presumption of negligence. *Marckwald v. Oceanic, etc. Co.* 11 Hun, 462. In an action to recover damages for death of a child of tender years, plaintiff is not required to give affirmative proof of damages. *Gorham v. N. Y. C. R. R. Co.* 23 Hun, 449; *Prendergrast v. N. Y. C. R. R. Co.* 58 N. Y. 652. In an action for death by negligence, though the general character of the deceased for kindness and affection toward his relatives may be shown, yet evidence of specific acts is not admissible. *Quinn v. Power*, 29 Hun, 183. In an action against a railroad company for negligence, proof of a violation of its rules by its servants is admissible on the question of negligence; *Wood v. N. Y. C. R. R. Co.* 70 N. Y. 195; but evidence that repairs were made at the place of the accident shortly after, is not, or that it afterward altered its machinery or appliances. *Payne v. Troy & B. R. R.*

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Co. 9 Hun, 526; *Dale v. D., L. & W. R. R. Co.* 73 N. Y. 468. But see *Morell v. Peck*, 88 N. Y. 398, and *Harvey v. N. Y. C. R. R. Co.* 19 Hun, 556. Evidence of failure to comply with a city ordinance is admissible. *Koster v. Noonan*, 8 Daly, 231; *Masoth v. D. & H. C. Co.* 64 N. Y. 524; *McGrath v. N. Y. C. R. R. Co.* 63 N. Y. 522; but it does not establish negligence *per se*. *Knuffle v. Knickerbocker Ice Co.* 84 N. Y. 488. Questions descriptive of the locality where the injury occurred are pertinent. *Casey v. N. Y. C. R. R. Co.* 6 Abb. N. C. 104, affirmed, 78 N. Y. 518. And any evidence tending to show the negligence complained of is competent. *Schwier v. N. Y. C. R. R. Co.* 12 Week. Dig. 215. The circumstances attending the injury and under which it occurred are competent. *Heeg v. Licht*, 80 N. Y. 579; *Walker v. Erie R. R. Co.* 63 Barb. 260; *Unger v. Forty-second St. R. R. Co.* 51 N. Y. 497; *Roberts v. Johnson*, 58 N. Y. 613; *Masoth v. D. & H. C. Co.* 64 N. Y. 524. Evidence of intoxication of party is competent as bearing on question of contributory negligence. *Milliman v. N. Y. C. R. R. Co.* 66 N. Y. 642.

Evidence that plaintiff was insured and the insurance had been paid is competent on the part of defendant. *Carpenter v. Eastern, etc. Co.* 71 N. Y. 574. Evidence as to character of machinery is competent. *Degraff v. N. Y. C. R. R. Co.* 3 T. & C. 255; s. c. 76 N. Y. 125; *Payne v. Troy & B. R. R. Co.* 83 N. Y. 572. Evidence of negligence by city authorities in repairing a sidewalk, from which death resulted, *held*, sufficient to charge the city with damages for the death caused thereby. *McMahon v. Mayor*, 33 N. Y. 642. Evidence of passengers on a train that they did not hear the bell or whistle sounded is competent, though it does not affirmatively appear that they were looking, watching or listening therefor. *Greany v. L. I. R. R. Co.* 101 N. Y. 419. See *Gaylord v. S. & B. R. R. Co.* 23 Week. Dig. 396; *Harry v. N. Y. & W. R. R. Co.* 23 Week. Dig. 198; *McCallum v. L. I. R. R. Co.* 38 Hun, 569. Evidence tending to show that the engineer in charge of an apparatus, the breaking of which caused the accident, was intoxicated at the time of the accident, is material upon the question of who was in fault, and as showing incompetency. *Probst v. Delamater*, 100 N. Y. 266. A scintilla of evidence, or mere surmise that there may have been negligence on the part of the plaintiff is not enough to send a case to the jury. *Casey v. N. Y. C. R. R. Co.* 25 Week. Dig. 568. In an

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action for injuries against a railroad company occasioned by negligence of a driver, it is incompetent to show that the driver was discharged the day after the accident. *Schmitt v. Dry Dock, etc. Co.* 3 St. Rep. 257.

Evidence offered by defendant in an action of this character, that it had paid the expenses of the support and maintenance of the intestate after the injury, up to his death and for his burial, was excluded, it not being offered by way of showing satisfaction or settlement of the cause of action, no such defence having been pleaded. *Murray v. Usher*, 117 N. Y. 542, distinguishing *Littlewood v. Mayor*, 89 N. Y. 24.

SUB. 5. GENERAL PROVISIONS RELATIVE TO THE ACTION.

The executor or administrator of a deceased person in bringing an action under this section is empowered to engage the services of an attorney and is, incident thereto, to agree upon the compensation to be given therefor, with the qualification that the amount so agreed upon shall be fair and reasonable. Where, upon the trial of an action of this character, a verdict was rendered for plaintiff and affirmed by the General Term, the plaintiff made an agreement with the defendant settling the action, a lien is created in favor of the attorney for the plaintiff for the amount of his compensation upon the amount paid in settlement. *Lee v. Van Voorhis*, 78 Hun, 575, affirmed, 145 N. Y. 603, 29 N. Y. Supp. 571, 61 St. Rep. 220, citing *In re Hynes*, 105 N. Y. 560, 8 St. Rep. 190; *Taylor v. Bemiss*, 110 U. S. 42; *Lee v. Vacuum Oil Co.* 126 N. Y. 579, 38 St. Rep. 662; *In re Knapp*, 85 N. Y. 284, 78 Hun, 575, 29 Supp. 571.

The cause of action given by § 1902 to the representative of a decedent whose death was caused by the negligence of another, does not abate against a corporation upon its dissolution, but may be continued by an order of the court against the receiver of the corporation. *People v. Troy Steel & Iron Co.* 24 Civ. Pro. R. 201, 63 St. Rep. 787, 82 Hun, 303. The provision of the Constitution of 1894, article 1, § 18, that "the right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation," does not operate retrospectively, and hence does not affect causes of action which had accrued before it went into effect. *Isola v. Weber*, 147 N. Y. 329, adopting the reasoning

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of the opinion in *O'Reilly v. The Utah, Nevada & California Stage Co.* 87 Hun, 406, 68 St. Rep. 432.

This provision of the Constitution of 1894 was not intended to change the law previously existing relative to such actions except that the provision in question authorizes a recovery of pecuniary damages actually sustained in excess of the limit of \$5,000 which had previously existed. The provision was not intended to change the power of the Supreme Court to supervise and in proper cases to reduce verdicts. *Medinger v. Brooklyn Heights R. R. Co.* 6 App. Div. 42. The cause of action given by the statute, §§ 1902 to 1905, to the executors or administrators of a deceased person to recover for damages for negligence causing his death, is no part of the assets of his estate; it is not subject to the payment of his debts or to the ordinary rules subject to the settlement or administration of the estates of deceased persons. *Stuber v. McEntee*, 142 N. Y. 200, 58 St. Rep. 455, 31 Abb. N. C. 246.

An ancillary executor may sue to recover damages by reason of death from wrongful act. *Lang v. Houston, West Street & P. F. R. R. Co.* 58 St. Rep. 594. Since this action is wholly statutory, the right of action cannot be barred by release from or payment to a person who does not at the time have authority to bring an action, or in a legal sense represent the cause of action. A compromise of such claim made by a person having no present interest is not a bar to an action by the same person, brought in his representative capacity after he has been appointed administrator. *Stuber v. McEntee*, 142 N. Y. 200, 58 St. Rep. 455, 31 Abb. N. C. 246. The right to maintain the action for damages for causing the death does not depend upon the right of support, and the fact that the only person dependent on deceased was one he was not bound to support is not material. *Palmer v. N. Y. C. R. R. Co.* 5 St. Rep. 435. The plaintiff must prove facts which warrant an inference of negligence on the part of defendant, and may not leave his case upon facts which are as consistent with care and prudence as with the opposite. *Hayes v. Forty-second St. R. R. Co.* 97 N. Y. 259. Where the act which caused the death is not shown to be the act of the defendant there can be no recovery. *King v. City of Troy*, 21 Week. Dig. 558. Where the proximate cause of the death of a child, *non sui juris*, is its own act, a defendant cannot be made liable. In the absence of proof of culpable

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negligence, it is not sufficient to show constructive negligence. *King v. City of Troy*, 21 Week. Dig. 558.

In an action against a railroad company for causing the death of a person crossing its track, *held*, not error to charge that the company had a right to travel over its road with pleasure at such rate of speed as it saw fit, but the circumstances might make the exercise of such right an element of negligence. *Salter v. Utica, etc. R. R. Co.* 88 N. Y. 42. It is proper to charge that if the course pursued by the deceased was one which persons of prudence and self-possession would adopt under like circumstances, he was not negligent in so doing; that the standard by which his conduct was to be judged was that of an ordinary, careful, prudent man. *Salter v. Utica, etc. R. R. Co.* 88 N. Y. 42. Where a person riding is apprised of the approach of a train, by the noise or otherwise, in time to enable him, by reasonable prudence, to avoid the danger, there can be no recovery, though no bell was rung and no whistle sounded. *Cosgrove v. N. Y. C. R. R. Co.* 87 N. Y. 88. The intemperate habits of deceased may be shown in mitigation of damages. *Devoe v. Van Vranken*, 29 Hun, 201. It is not negligence, as matter of law, to cross a railroad track without looking; *Weber v. N. Y. C. R. R. Co.* 67 N. Y. 587; *Brassell v. N. Y. C. R. R. Co.* 84 N. Y. 241. *Contra, Mitchell v. N. Y. C. R. R. Co.* 2 Hun, 553, affirmed, 64 N. Y. 655; or to get on or off a car while it is moving. *Filer v. N. Y. C. R. R. Co.* 49 N. Y. 47. These are questions of fact for the jury. *Payne v. Troy & B. R. R. Co.* 83 N. Y. 572. The plaintiff must show that he is free from contributory negligence. *Wendell v. N. Y. C. R. R. Co.* 91 N. Y. 420.

The question of negligence is for the jury; *Hart v. Hudson River Bridge Co.* 80 N. Y. 622; and to justify a nonsuit on the ground of contributory negligence, such negligence must appear so clearly that no construction of the evidence would warrant the jury in finding a verdict for plaintiff. *Stackus v. N. Y. C. R. R. Co.* 79 N. Y. 464. Certain careless acts are, however, recognized as contributory negligence. *Connolly v. N. Y. C. R. R. Co.* 88 N. Y. 346; *Phillips v. R. & S. R. R. Co.* 49 N. Y. 177. Employees assume the risk incident to the business in which they engage, and while the employer is bound to furnish safe machinery, he is not liable for an injury occasioned by its breaking unless he has been guilty of negligence with respect to it; there cannot be a recovery when it is not shown that the defect was, or that it should

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have been discovered by examination. *Degraff v. N. Y. C. R. R. Co.* 76 N. Y. 125; *Warner v. Erie R. R. Co.* 39 N. Y. 468. The duty of the master to the servant is to exercise ordinary care. *Leonard v. Collins*, 70 N. Y. 90; *Warren v. Jewett*, 85 N. Y. 61. The negligence of a servant in using imperfect machinery does not excuse a co-employee for an injury which could not have happened had the machinery been suitable for the use to which it was applied. Where the injury is the sole result of the servant's negligence, the rule is different. *Cone v. D., L. & W. R. R. Co.* 81 N. Y. 210; *Ellis v. N. Y., L. & W. R. R. Co.* 95 N. Y. 546. An employer is not liable for negligence of a fellow workman of the person injured. *Crispin v. Babbitt*, 81 N. Y. 516. But where the master delegates to another entire control over a particular branch of business, the person to whom such power is delegated stands in the place of the master. *Flike v. B. & A. R. R. Co.* 53 N. Y. 549; *Sheehan v. N. Y. C. R. R. Co.* 91 N. Y. 334. The question as to whether the employer is negligent in furnishing defective machinery is for the jury. *Painton v. Northern Central R. R. Co.* 83 N. Y. 7.

A sudden jerk of a train by the engine, while a passenger is alighting, is negligence, whether caused by a forward or backward motion. *Milliman v. N. Y. C. R. R. Co.* 66 N. Y. 642; *Sauter v. N. Y. C. R. R. Co.* 66 N. Y. 50. Plaintiff, who was struck by an engine running on a track used by defendant and another corporation, must show affirmatively that such engine belonged to defendant. *McDermott v. N. Y. C. & H. R. R. Co.* 8 Week. Dig. 531. Every person violating an express statute is a wrong-doer, and as such, *ex necessitate* negligent in the eyes of the law. *Massoth v. D. & H. C. Co.* 64 N. Y. 524. It is negligence *per se* for a foot traveler to attempt to cross a public thoroughfare ahead of vehicles of any kind upon a nice calculation of the chances of injury. *Belton v. Baxter*, 54 N. Y. 245.

A female who takes a gratuitous ride upon the invitation of the owner of a horse and carriage, in an action against a railroad company for injuries, is not chargeable with the negligence of the owner in driving. *Robinson v. N. Y. C. R. R. Co.* 66 N. Y. 11. A mistake of a competent medical attendant in treating a person, though the immediate cause of death, is not a defence to an action for negligence for an injury. *Sauter v. N. Y. C. R. R. Co.* 66 N. Y. 50. It seems that to navigate a steamboat with an unin-

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spected boiler is to maintain a nuisance, and that an action may be sustained for damages sustained by such an explosion, without proof of other negligence. *Van Norden v. Robinson*, 45 Hun, 567. Leaving an opening in the floor of a hallway unprotected and unguarded, in disregard of an ordinance relating to such openings, is *prima facie* evidence of negligence on the part of the occupant. *Heidinger v. Hinc*, 18 Week. Dig. 404. A lofty scaffold for workmen to stand upon is not of itself a nuisance, if properly constructed, or dangerous within the rule rendering the maker liable irrespective of privity. *Devlin v. Smith*, 89 N. Y. 470.

SUB. 6. DAMAGES AND FOR WHOSE BENEFIT AWARDED. §§ 1903, 1904, 1905.

§ 1903. *Id.*; for whose benefit.

The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper.

§ 1904. [Am'd, 1895.] *Id.*; amount of recovery.

The damages awarded to the plaintiff may be such a sum as the jury upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought. When final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report or decision, may specify the day from which interest is to be computed; if it omits so to do, the day may be determined by the clerk, upon affidavits.

§ 1905. Next of kin defined.

The term, "next of kin," as used in the foregoing sections, has the meaning specified in section 1870 of this act.

The object of the statute was to give to the next of kin the right of action which the deceased would have had, and the plaintiff is not limited to the actual pecuniary loss proved. *Oldfield v. N. Y. & H. R. R. Co.* 3 E. D. Smith, 103, affirmed, 14 N. Y. 310. As the statute expressly gives the right of action, nominal damages may be recovered, at least; and where the decedent was a minor of twelve years, and the only heir and next of kin of his

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mother, a recovery was sustained. *Quin v. Moore*, 15 N. Y. 432. Where a father sues as administrator of the infant son, to recover damages for the death of the latter, and the recovery is for the father's exclusive benefit, he may recover full damages, including the loss of the son's services during minority. *McGovern v. N. Y. C. R. R. Co.* 67 N. Y. 417. If any pecuniary loss or injury be shown, the jury are at liberty to give such damages as they shall deem a fair and just compensation therefor within the statutory limitation. *Cornwall v. Mills*, 44 Super. Ct. 45; *Etherington v. Prospect Park, etc. R. R. Co.* 88 N. Y. 641. The measure of damages is the pecuniary loss sustained by the widow and next of kin; the jury cannot give vindictive damages. *Lehman v. City of Brooklyn*, 29 Barb. 234. In an action for death by negligence, the jury may consider such damages as arise from the loss of personal care, intellectual culture and moral training which would have been received from the deceased. *McIntyre v. N. Y. C. R. R. Co.* 37 N. Y. 287. In an action by the administrator of a married woman to recover damages for her death, caused by defendants' negligence, the loss sustained by her infant children, in being deprived of her nurture and education, is a proper ground for substantial damages. *Tilley v. H. R. R. Co.* 24 N. Y. 471; *Tilley v. H. R. R. Co.* 29 N. Y. 252. The jury may consider the value of his support to his wife and children, of the deceased during his probable life; nor is it error to charge that the only limit to the damages, which it is in the power of the jury to award, is the sum fixed by statute. *Althorff v. Wolf*, 2 Hilt. 344, affirmed, 22 N. Y. 355.

Although the statute implies from the death of the person negligently injured, damages to the next of kin, and recognizing the prospective and indefinite character, and the improbability of a basis for accurate estimate, allows the jury to give what they deem just (not exceeding \$5,000, previous to Constitution of 1894), the jury are required to judge, not merely to guess, and such basis for their judgment as the facts naturally capable of proof can give is required. The age, sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased, should all be given and considered. *Houghkirk v. D. & H. R. R. Co.* 92 N. Y. 219. In an action for the death of a son it may be shown that the mother had no means of her own and that the deceased son contributed

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to her support. *Waldele v. N. Y. C. R. R. Co.* 29 Hun, 35. The funeral expenses of the deceased are a proper item of damages. *Murphy v. N. Y. C. R. R. Co.* 88 N. Y. 445. The jury have no right to consider the advantages resulting to the plaintiff as decedent's next of kin — *Terry v. Jewett*, 17 Hun, 395; s. c. 78 N. Y. 338— nor that decedent's life was insured. *Kellogg v. N. Y. C. R. R. Co.* 79 N. Y. 72; *Althorf v. Wolf*, 22 N. Y. 355. It seems that all damages to which a father is entitled for the death of his unmarried minor child he may recover, in an action brought by himself as administrator, including expenses for nursing, medical attendance, funeral expenses, etc., and that he could also recover for the loss of the child's services. *Stuebing v. Marshall*, 2 Civ. Pro. R. 77. It is erroneous to leave it to the jury, from probable duration of life of the deceased and one relative whom he was supporting at the time of his death, and the costs and continuance of such support, to compute the damages. *Palmer v. N. Y. C. R. R. Co.* 5 St. Rep. 436.

Evidence tending to show the decedent's probability of life, his age, health, condition and ability to earn money, his manner of life, etc., is competent on the question of damages. *Palmer v. N. Y. C. R. R. Co.* 5 St. Rep. 436. The absence of proof of special pecuniary damages will not justify the court in nonsuiting the plaintiff, or in directing the jury to find nominal damages. *Ryall v. Kennedy*, 40 Super. Ct. 347, affirmed, 67 N. Y. 379. For negligence causing the death of an infant of tender years, plaintiff is not limited to nominal damages. *Gorham v. N. Y. C. R. R. Co.* 23 Hun, 449; *Prendergrast v. N. Y. C. R. R. Co.* 58 N. Y. 652. See *Mitchell v. N. Y. C. R. R. Co.* 2 Hun, 535, affirmed on another point, 64 N. Y. 655. In an action for negligence causing death, *held*, proper to refuse to charge "that where the children of deceased are of full age, and living away from the home of the deceased and supporting themselves, no such pecuniary loss has been sustained by them as can be recovered in the action." The plaintiff was permitted to prove that the adult children of deceased had no property of their own, and that a daughter who lived with him, doing household work, receiving nothing therefor, and paying nothing for her board, was afflicted with some disease, in consequence whereof she was not as able to work as she otherwise would have been. *Lockwood v. N. Y., C. & L. E. R. R. Co.* 98 N. Y. 523. *Held*, that the courts have found it impossible to lay down

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any definite guide for the jury in estimating damages under the act in question, and decline to attempt to do so, and the following cases are cited on the point, in addition to those which have been collated: *Ihl v. Forty-second Street R. R. Co.* 47 N. Y. 317; *Bierbauer v. N. Y. C. R. R. Co.* 15 Hun, 559; s. c. 77 N. Y. 588; *Harlinger v. N. Y. C. R. R. Co.* 15 Week Dig. 392; s. c. 92 N. Y. 661.

In an action for the death of a son seventeen years of age, it is error to leave it to the jury to consider the benefit likely to result to the parents from his advice and counsel, in the absence of evidence which might serve the jury on that point, other than that he was living with his father and assisting him. In some cases it seems the prospective loss of such assistance may be considered. *Gill v. Rochester, etc. R. R. Co.* 37 Hun, 107. The damages do not, necessarily, depend on the pecuniary condition of the next of kin of the deceased, nor on the legal duty or obligation of the deceased if he had lived. The damages are not confined to present loss or injury, but may include such as the jury may, upon the evidence, believe and find, in the future result from the death as the proximate cause of it. The prospective injuries may be in the loss of aid, care and attention, whether by services or money, or either, and by advice, direction and protection. *Carpenter v. Buffalo, etc. R. R. Co.* 38 Hun, 116, citing cases *supra*.

Where a stipulation is given that an action for personal injury shall not abate by reason of the death of a party, *held*, that his executors were entitled to recover such a sum as would have compensated him had he been alive, although his estate had not suffered by reason of the injury. *Cor v. N. Y. C. R. R. Co.* 11 Hun, 621. A recovery for the benefit of the mother, of \$1,300, for wrongs which caused the death of a child seven years of age, is sustainable. *Oldfield v. N. Y. & H. R. R. Co.* 14 N. Y. 310.

In an action for death of a sister of plaintiff, a girl fourteen years of age, where it appeared that her father was not known to be living and has not provided for his family for many years, *held*, a verdict for \$3,500 was not excessive. *Pinco v. N. Y. C. R. R. Co.* 34 Hun, 80, affirmed, 99 N. Y. 644. For death of an infant son, three and a half years old, \$1,800 *held* not excessive. *Fitzgerald v. National S. S. Co.* 1 Week. Dig. 225. A verdict of \$5,000, for a son's death, in favor of a helpless mother, who was largely dependent on her son's earnings for her support, will not

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be set aside as excessive, this being the third trial; on the first recovery having been \$1,500, and on the second, \$1,000. *Erwin v. Neversink, etc. Co.* 23 Hun, 573. The Northampton tables are a proper standard by which to compute the expectancy of life of one for whose death recovery is sought under the Civil Damage Act, and the court will take judicial knowledge of such tables without their being offered in evidence, as they form part of the rules of the court. *Davis v. Standish*, 26 Hun, 608. A verdict for damages for negligent killing, bears interest from the time of the death to the date of the verdict, at the rate provided by the statute when the verdict is rendered. *Salter v. Utica, etc. R. R. Co.* 86 N. Y. 401, overruling *Erwin v. Neversink Co.* 23 Hun, 578. The jury have nothing to do with the question of interest on the damages that is to be added in the entry of judgment. *Manning v. Port Henry Iron Ore Co.* 91 N. Y. 664, reversing 27 Hun, 219. The question to be decided by the jury in determining the amount of damages is, what was the reasonable expectation of pecuniary benefit to the next of kin, by inheritance or otherwise from the continuance in life of the deceased, worth in money? If the requirements of the statute in other respects are satisfied, the plaintiff is entitled to recover at least nominal damages, and the fact of deceased surviving the casualty which caused his death is no reason for holding, as matter of law, that plaintiff could not recover damages at all, or only nominal damages. *Thomas v. Utica, etc. R. R. Co.* 6 Civ. Pro. R. 353.

Pecuniary damages do not include any damages for suffering by the decedent, or mental suffering by the next of kin. *Dorman v. Broadway Co.* 1 Supp. 334. That no damages can be given for wounded feelings was held in *Blake v. Midland Railway Co.* 18 Q. B. 93, and has been followed in this country as well as in England.

In an action to recover the pecuniary injuries resulting from the death of a young child, caused by the wrongful act or negligence of the defendant, the recovery is not limited to nominal damages merely. The amount of damages upon such proof as can be made is for the determination of the jury, subject to be reviewed and modified, if the designation is abused, in the court of original jurisdiction, but not in the Court of Appeals. It seems that the jury is not bound to confine their consideration to the minority of the child, and they may take into consideration

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all the probable or even possible benefits which might result to the parents from its life, modified as in their estimation it should be by all the chances of failure or misfortune. *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504, 41 Hun, 404.

The basis of damage is the supposed pecuniary value to the parents of the life of the infant. *Etherington v. Railroad Company*, 88 N. Y. 641; *Houghkirk v. Railroad Company*, 92 N. Y. 219; *Butler v. Manhattan Ry. Co.* 143 N. Y. 417.

The moneys recovered or received in settlement of an action brought by an administrator to recover damages caused by negligence resulting in decedent's death, although declared by statute to be exclusively for the benefit of the decedent's next of kin, are not exempt from the next of kin's creditors. *Wynkoop v. Myers*, 17 Civ. Pro. R. 443. What is a just and fair compensation for the pecuniary injury in a given case under this statute can be determined by no rule. Each case presents a different state of facts either in character, capacity or condition of the deceased, or in the age, sex, circumstances and condition of the next of kin, all of which elements are to be considered as the basis for an allowance for damages. The pecuniary injury sustained by a husband from the loss of his wife, who was his housekeeper, consists of the loss of his wife's services, the expense incident to and running from the injury and the loss of his wife's society. *Klemm v. N. Y. C. & H. R. R. Co.* 78 Hun, 277, citing *Lockwood v. N. Y., L. E. & W. R. R. Co.* 98 N. Y. 523; *Cregin v. Brooklyn Cross-Town R. R. Co.* 83 N. Y. 595.

The cause of action given by this statute is no part of the assets of the estate of the decedent. It is not subject to the payment of his debts or to the ordinary rules applicable to the settlement and administration of the estates of deceased persons. Where the defendant paid to one of the plaintiffs a sum of money before his appointment as administrator, he giving a receipt therefor which stated that the payment was for all expenses caused by the death and that he had no further claim against defendant, it was *held* the receipt was not a settlement of the claim or a bar to the action. It seems that in such case defendant would be allowed to show that the money paid was used to pay the expenses of the funeral and burial of the deceased and to be credited with the same by the jury in estimating damages. *Stuber v. McEntee*, 142 N. Y. 200.

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In an action under the statute for negligence or wrongful act causing the death of an infant of tender years there is no such presumption of pecuniary loss to the next of kin as to justify setting aside a verdict for nominal damages as inadequate. The plaintiff on recovering nominal damages is entitled to full costs. *Silberstein v. William Wicke Co.* 29 Abb. N. C. 291, 22 N. Y. Supp. 170. In an action under § 1902, an administrator is entitled to a full bill of costs if he has a verdict in his favor, although the damages awarded amount to less than \$50. *Gorton v. U. S. & Brazil Mail & Steamship Co.* 20 Civ. Pro. R. 202, 37 St. Rep. 556. An extra allowance should be computed on the sum awarded by the jury, and interest to the date of trial from the death of deceased. *Boyd v. N. Y. C. R. R. Co.* 6 Civ. Pro. R. 222. But in *Sinne v. The Mayor*, 8 Civ. Pro. R. 252, it was held that an extra allowance should be computed only on the amount of the verdict, without adding interest. The amount of a verdict under § 1904 is largely in the discretion of the jury. *Fitzgerald v. N. Y. C. & H. R. R. Co.* 88 Hun, 359, citing *Johnson v. Long Island R. R. Co.* 80 Hun, 306.

The measure of damages to the next of kin, in actions for death caused by negligence, is for the jury to determine, and their decision will not be disturbed unless shown to have been affected by improper influences. *Kane v. Mitchell Transp. Co.* 90 Hun, 65, 35 N. Y. Supp. 581, 70 St. Rep. 203.

In *Leavitt on Negligence*, at page 768, will be found a very large number of cases on this subject carefully collated.

ARTICLE IV.

ACTION FOR SLANDER OF A WOMAN. § 1906.

§ 1906. Action for slander of a woman.

In an action of slander, brought by a woman, for words imputing unchastity to her, it is not necessary to allege or prove special damages. If the plaintiff is married, the damages recovered are her separate property.

The words "she is a common prostitute and I can prove it" were not actionable at common law — *Brooker v. Coffin*, 5 Johns. 188 — except upon proof of special damages. *Buys v. Gillespie*, 2 Johns. 115; *Bradt v. Townsley*, 13 Wend. 252; *Williams v. Hill*, 19 Johns. 305. This section is a re-enactment of the provisions of chapter 219, Laws 1871. Words charging a female with

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self-pollution are not actionable *per se*. *Anonymous*, 60 N. Y. 262. Statements made by residents of a school district, having a daughter attending school, to the trustees affecting the character of a female teacher, are privileged, but if the defendant had no reason to believe the statement to be true, it is evidence of malice and will render him liable. *Harwood v. Kecch*, 4 Hun, 389. See *Halstead v. Nelson*, 34 Hun, 395. In an action under this statute plaintiff is not confined to proof of the charge set forth in the complaint, but evidence is competent of words spoken at any time before the commencement of the action, repeating substantially the same charge. Where an answer in an action of slander alleges the truth of the words spoken, it is not error for the court to refuse to charge, as matter of law, that the answer cannot be considered by the jury to enhance damages. It seems, however, this rule should be confined to cases of bad faith in incorporating the justification of the pleading. *Distin v. Rose*, 69 N. Y. 122.

Unchastity in a woman means that she has had unlawful sexual intercourse, or is guilty of such conduct as would tend to indicate that she was ready and willing to submit to the unlawful embraces of a man. *Mason v. Stratton*, 17 St. Rep. 302.

A pleading in an action of slander charging defendant with saying that plaintiff "was in the habit of entertaining gentlemen callers at all hours of the night," is not sufficient without an innuendo or allegation of some kind that they were used in a sense to render them actionable. *Hemmens v. Nelson*, 138 N. Y. 517.

In an action under this section, defendant will not be entitled to a bill of particulars showing the names of persons who have shunned plaintiff in consequence of the publication, but defendant is entitled to know plaintiff's address, in order to be better able to investigate her antecedents, in case he wishes to set up justification. *Butterfield v. Bennett*, 18 Supp. 432. As to what words constitute a charge of unchastity, see *Mason v. Stratton*, 17 St. Rep. 302. To say concerning a married woman that she is not a lady, or that she has worked in a low hotel and "any one who worked there ain't much," does not necessarily impute unchastity to her, and such words are not slanderous *per se*. Innuendos cannot extend the meaning of words beyond what is justified by the words themselves and the extrinsic facts with which they are connected. *Brown v. Moore*, 90 Hun, 169, 35 N. Y. Supp. 736, 70 St. Rep. 532. It is libelous to write concerning a married

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woman that she is living with a man not her husband. *Shea v. Sun Printing & Pub. Co.* 14 Misc. 415, 35 N. Y. Supp. 703, 70 St. Rep. 438.

ARTICLE V.

WHEN ACTION FOR LIBEL CANNOT BE MAINTAINED.

§§ 1907, 1908.

§ 1907. When action for libel cannot be maintained.

An action, civil or criminal, cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein of a fair and true report of any judicial, legislative, or other public and official proceedings, without proving actual malice in making the report.

§ 1908. The last section qualified.

The last section does not apply to a libel, contained in the heading of the report; or in any other matter, added by any person concerned in the publication; or in the report of any thing said or done, at the time and place of the public and official proceedings, which was not a part thereof.

A fair report of a public official proceeding is privileged. *Edsall v. Brooks*, 26 How. 426. The publication of a slander uttered by a murderer at the time of his execution is not privileged by statute or at common law. The statute relates only to statements made in judicial, legislative or administrative bodies, in execution of some public duty. *Sanford v. Bennett*, 24 N. Y. 20. The publication of a fair and true report of any judicial proceeding is privileged. Malice will not be presumed, but must be proved to permit a recovery for libel. The publication must be fair, not garbled so as to produce misrepresentation, nor by suppression of some portion of the evidence or proceedings, have the effect to give a false or unjust impression to the prejudice of some parties concerned; but the report need not be verbatim or embrace the entire proceeding. It may be an abridged or condensed statement. If it is a substantially fair, accurate account, that is sufficient. It is not the reporter's judgment of the correctness of his comments and their import, but their accuracy and fairness, which give immunity. The statute expressly excludes from the operation of its provisions the headings of the publication, or any other matter not part of the proceedings, added to the report of it. *Salisbury v. Union, etc. Co.* 9 St. Rep. 465, 45 Hun, 120.

A proceeding before a police magistrate is a judicial proceeding. *Bissell v. Press Pub. Co.* 17 Supp. 393, 42 St. Rep. 412, 62

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Hun, 551. But proceedings before a grand jury are not. *McCabe v. Cauldwell*, 18 Abb. 377.

The question whether a communication containing a libel is privileged, is one of law to be determined by the court. This privilege, so far as it protects the publishers of a report of a judicial proceeding, does not include imputations voluntarily made, which are plainly irrelevant and impertinent, and does not authorize headlines of an article which, when considered in connection with the article introduced by them, were libelous. Statements which are defamatory, if they constitute a fair and true report of a judicial proceeding, are privileged in the absence of proof of actual malice. *Hart v. Sun Printing and Publishing Ass'n*, 79 Hun, 359, 61 St. Rep. 427.

In *Sanford v. Bennett*, 24 N. Y. 20, *supra*, *Stanley v. Webb*, 4 Sandf. 21, is cited to the point that the publication of *ex parte* proceedings before a public magistrate, such as a complaint against an individual for a criminal offence, was not privileged. However, in *Bissell v. Press Publishing Co.* 62 Hun, 551, *supra*, in the opinion it is said that this case was decided prior to the passage of the Code and is no longer an authority, pointing out in addition the fact that the same court which decided *Stanley v. Webb*, subsequently held in *Ackerman v. Jones*, 37 Super. Ct. 55, that proceedings before a police magistrate were judicial proceedings within the meaning of the act and that there was no distinction between such proceedings and the regular proceedings at law, and indorsing the correctness of that decision. Upon the point that the inquiry in such case is as to whether communication was privileged and to the effect that that was a question of law for the court. *Hart v. Sun Printing and Publishing Ass'n*, 79 Hun, 358, *supra*, cites *Lowell Company v. Houghton*, 116 N. Y. 500, *Moore v. Bank*, 123 N. Y. 420.

CHAPTER XXX.

MISCELLANEOUS ACTIONS AND RIGHTS OF ACTION.

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ARTICLE I.

WHAT CLAIMS OR DEMANDS ARE ASSIGNABLE. §§ 1909-1912.

SUB. 1. WHAT CLAIMS ARE ASSIGNABLE. §§ 1909, 1910, 1911, 1912.

2. WHAT CLAIMS ARE NOT ASSIGNABLE.
3. WHO HAS POWER TO ASSIGN CLAIMS.
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SUB. 1. WHAT CLAIMS ARE ASSIGNABLE. §§ 1909-1912.

§ 1909. When transferee of claim or demand may sue. Rights of defendant, etc.

Where a claim or demand can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding, or interpose as a defence or counterclaim, in his own name, as the transferor might have done; subject to any defence or counterclaim, existing against the transferor, before notice of the transfer, or against the transferee. But this section does not apply, where rights or liabilities of a party to a claim or demand, which is transferred, are regulated by special provision of law; nor does it vary the rights or liabilities of a party to a negotiable instrument, which is transferred.

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§ 1910. What claims or demands may be transferred.

Any claim or demand can be transferred, except in one of the following cases:

1. Where it is to recover damages for a personal injury, or for a breach of promise to marry.
2. Where it is founded upon a grant, which is made void by a statute of the state; or upon a claim to or interest in real property, a grant of which, by the transferor, would be void by such a statute.
3. Where a transfer thereof is expressly forbidden by a statute of the state, or of the United States, or would contravene public policy.

§ 1911. Id.; cause of action for usury.

A cause of action to cancel, or otherwise affect, an instrument executed, or an act done, as security for a usurious loan or forbearance, can be thus transferred, where the instrument or act creates a specific charge upon property; which is also transferred in disaffirmance thereof, and not otherwise; but, in that case, the transferee does not succeed to the right, conferred by statute upon the borrower, to procure relief, without paying, or offering to pay, any part of the sum or thing loaned.

§ 1912. Judgment, when assignable,

A judgment for a sum of money, or directing the payment of a sum of money, recovered upon any cause of action, may be transferred; but if it is vacated or reversed, the transfer thereof does not transfer the cause of action, unless the latter was transferable before the judgment was recovered.

An assignment is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. Bouv. Law Dict. The common law definition of an assignment is, "the transferring and setting over to another of some right, title or interest in things in which a third party, not a party to the assignment, has a concern and interest." 1 Bac. Abr. 329.

In *Thalheimer v. Brinckerhoff*, 3 Cow. 645, the chancellor said: "It is a principle of the common law that a right of action could not be transferred by him who had the right to another. When we seek the reason of this rule, we find in it the motive already mentioned, an apprehension that justice would fail and oppression would follow if rights of action might be assigned. * * * Feeble, partial and corrupt must have been the administration of justice where such a reason could have force. In early times this rule concerning rights of action was rigorously enforced. As the entire right of action could not be assigned, so no part of it could be transferred, and no man could purchase another's right to a suit, either in whole or in part. Hence the doctrine of maintenance, which prohibits contracts for a part of the thing in demand, was adopted as an auxiliary regulation, to enforce the

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general principle which prohibited the transfer of all rights of action. But the rule of the common law that rights of action cannot be assigned has in modern times been reversed; the apprehension that justice would be trodden down if property in action should be transferred is no longer entertained; and the ancient rule now serves only to give form to some legal proceedings. In the courts of equity this rule was never followed, and those courts have always considered and treated the rule as unjust, and have supported assignments of rights of action. Experience has fully shown not only that no evil results from the assignments of rights of action, but that the public good is greatly promoted by the free commerce and circulation of property in action, as well as of property in possession."

The codifiers in their note to § 1909, say that the phrase "but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract," which was contained in § 111 of the old Code, has given rise to a very large number of adjudications, and that these provisions will supersede nearly all this vast mass of adjudications, while the remainder will be valuable only because the section has been confined to the enforcement of causes of action and is, therefore, inapplicable to questions arising upon defences other than counterclaims, and to the regulations of law respecting the transfer of property, including those vague interests which are not properly embraced by the phrase "a cause of action," and that as to the latter class, their connection with the provision referred to above is usually quite remote, and they may be left to be regulated by general principles without any special statutory provision. It is further stated by the codifiers that the section settles the disputed questions relating to the assignability of causes of action, by providing that every cause of action is assignable unless it comes within one of the special exceptions. The general rule to be derived from the authorities is that the test of assignability of the cause of action is whether it would pass to the executor or administrator, but this is too vague a test for actual use in many cases, and has given rise to different and difficult questions. In view of the radical changes made by this section, no attempt will be made to collate all the decisions previous to their enactment, and references will be made to only such as are more important and may be of service as the law now stands. Section 1909 does not prescribe that an

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action on such claim can be brought by the assignee only, under the same circumstances which would have entitled the assignor to sue, and hence a judgment may be sued upon by an assignee without leave of the court. *Carpenter v. Butler*, 29 Hun, 251. As the rights under chapter 40, Laws of 1848 (General Manufacturing Act), have no existence outside of the statute, the right of transfer given by the Code of Procedure, § 1910, does not give a right of enforcement to the transferee under § 1909, but leaves the question of that right to the existing law. It is true that at common law, and, as a general rule, the qualities of assignability and survival are tests of each other, and convertible terms. *Blake v. Gristwold*, 104 N. Y. 613, citing as to the last proposition, *Hegerich v. Keddle*, 99 N. Y. 258, and *Brackett v. Gristwold*, 103 N. Y. 425. The rule that no cause of action is assignable that would not pass to personal representatives is also held. *Zabriskie v. Smith*, 13 N. Y. 322. Where property is wrongfully detained, the owner may assign his title to it, and the assignee, after a fresh demand, may maintain trover. *Hall v. Robinson*, 2 N. Y. 293. A claim for money which has been paid under fraudulent representations is assignable. *Byxbie v. Wood*, 24 N. Y. 607. But see *Zabriskie v. Smith*, 13 N. Y. 322.

A cause of action for fraud in the purchase and sale of real estate is also assignable. *Graves v. Spier*, 58 N. Y. 349. A right of action to recover damages for the non-performance of a contract is assignable after breach. *Dana v. Fiedler*, 12 N. Y. 40. A right of action against a common carrier to recover the value of property entrusted to him is assignable. *Merrill v. Grinnell*, 30 N. Y. 594. A cause of action against the trustees of a corporation for failure to report is assignable. *Bonnell v. Wheeler*, 1 Hun, 332; *Pier v. George*, 86 N. Y. 613. A right of action for carelessly and negligently setting fire to, and burning up grass and fences, and hay stacked upon a farm is assignable; *Friend v. N. Y. C. R. R. Co.* 25 How. 285; as is the right to recover for moneys lost in gambling; *Meach v. Stoner*, 19 N. Y. 26; the right to damages for the wrongful conversion of personal property; *Drake v. Smith*, 12 Hun, 532; *Haight v. Hoyt*, 19 N. Y. 464; *McKee v. Judd*, 12 N. Y. 632; *Richtmeyer v. Remsen*, 38 N. Y. 206; *McKeage v. Hanover Fire Ins. Co.* 81 N. Y. 38; a right to pay for services; *Hooker v. Eagle Bank of Rochester*, 30 N. Y. 83; interest of next of kin of persons killed by negligence in recovery

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therefor. *Quinn v. Moore*, 15 N. Y. 432. A cause of action may be assignable although assignor or assignee may be disabled from maintaining action in the State. *Peterson v. Chemical Bank*, 32 N. Y. 21; *McBride v. Farmers' Bank*, 26 N. Y. 450. A contract to plant and sell crops is assignable by buyer without seller's assent. *Sears v. Conover*, 4 Abb. Dec. 179. All expectant estates, whether vested or contingent, are assignable. *Moore v. Little*, 41 N. Y. 66; *Ham v. Van Orden*, 84 N. Y. 257. As is a legacy payable at a future time after the death of the testator. *Parmalee v. Cameron*, 41 N. Y. 392. The dower interest which a widow has in the lands of her deceased husband, and the assignee must sue in his own name. *Payne v. Becker*, 87 N. Y. 153.

A right of action to set aside a fraudulent conveyance. *McMahon v. Allen*, 35 N. Y. 403. A claim under a fire insurance policy, although the policy itself may not be assignable. *Fowler v. N. Y. Indemnity, etc. Co.* 26 N. Y. 422; *Mellen v. Hamilton, etc. Co.* 17 N. Y. 609. And the policy is itself assignable when not forbidden by its terms. *St. John v. American, etc. Co.* 13 N. Y. 31. A public contract for cleaning the streets. *Devlin v. New York*, 63 N. Y. 8. The right to ice to form on a given area. *Myer v. Whittaker*, 5 Abb. N. C. 172. A cause of action for damages upon an undertaking upon an order of arrest. *Moses v. Waterbury, etc. Co.* 37 Super. Ct. 393; *Bamberger v. Kahn*, 43 Hun, 411. A contract to build, entered into by a corporation, is assignable, the matter of such a contract involving no personal relation or confidence between the parties. *New England Iron Co. v. Gilbert, etc. R. R. Co.* 91 N. Y. 153. So is an annuity given by a will when it is the interest of a fixed sum. *Cocks v. Barlow*, 5 Redf. 406.

A cause of action for damages, for fraud perpetrated by combining with an insolvent purchaser of goods to recommend him to the seller and induce the sale by false representations as to his credit, and in consideration of receiving a share of the fruits of the fraud, is assignable as distinguished from a mere action of deceit in misrepresenting the solvency of a third person. *Moore v. McKinstry*, 37 Hun, 194. The claims of minor children under the Civil Damage Act were held assignable in *Ludwig v. Glaessel*, 34 Hun, 312, upon the authority of *Moriarty v. Bartlett*, 34 Hun, 272, which latter case was reversed, 99 N. Y. 651. A factor who has sold the goods of his principal, guaranteed the sale, and

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made advances thereon, has a cause of action against the vendee which is assignable. *Commercial Bank of Pennsylvania v. Helbronner*, 52 Super. Ct. 388. An invention before patent issued thereon is assignable. *Jones v. Reynolds*, 7 St. Rep. 586. As is a right of action against a sheriff for failing to return an execution, and for making a false return. *Jackson v. Daggett*, 24 Hun, 204. A right to enforce the execution of a power in trust. *Clark v. Crego*, 51 N. Y. 646. A cause of action for the reformation of a contract. *Bentley v. Smith*, 1 Abb. Dec. 126. A cause of action for work performed under a contract, void under the statute of frauds, is assignable. *Rosepaugh v. Vredenburg*, 16 Hun, 60. A verdict recovered for a personal tort. *Mackey v. Mackey*, 43 Barb. 58; *Zogbaum v. Parker*, 66 Barb. 341; *Brooks v. Harford*, 15 Abb. 342, holding the contrary. A judgment recovered for personal injuries is assignable. *Dougherty v. Gardner*, 8 Abb. N. C. 134.

Where a judgment recovered before the trial court is assigned, together with all sums "of money that may be had or obtained by means thereof or on any proceeding to be had thereon," and such judgment is enforced on appeal, the assignee of the judgment is liable for the costs recovered by the defendant by reason of the failure of the plaintiff's cause of action, and an order is properly made by the court directing the payment of such costs by such assignee. It is only when the judgment attempted to be assigned has been recovered upon a cause of action not itself assignable or transferable that the attempted assignment will not operate to charge the assignee with the costs of the action where such judgment shall be subsequently reversed on appeal. *Tucker v. Gilman*, 58 Hun, 167, affirmed without opinion, 125 N. Y. 714, 33 St. Rep. 962, 11 N. Y. Supp. 555.

Where a judgment between two debtors is several and not joint, it seems that it may be separately assigned as against one of them only. *Whittmore v. Judd Linseed & Sperm Oil Co.* 124 N. Y. 565, 36 St. Rep. 881. The assignment by a devisee of an interest in real estate was sustained in *Matter of Valentine*, 38 St. Rep. 333, 13 Supp. 444, affirmed, 128 N. Y. 611. A certificate of a tax sale is not a negotiable instrument and its mere indorsement by the purchaser will not be effectual to transfer it or a claim under it to have the purchase money refunded. *White v. City of Brooklyn*, 122 N. Y. 35, 33 St. Rep. 307. An

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executor's commissions before they are ascertained and liquidated in the manner authorized by law, are not assignable. *Matter of Worthington*, 141 N. Y. 9, 56 St. Rep. 561.

An assignment for a valuable consideration by a son, of his expectant interest in his father's estate, though made to the father himself, may be enforced in equity after the father's death. *Kinyon v. Kinyon*, 72 Hun, 452, 31 Abb. N. C. 76, 25 Supp. 225, 55 St. Rep. 247. An assignment of his distributive share by his apparent next of kin of a living person vests no interest in the assignee. *Smith v. Baylies*, 3 Dem. 567. See, however *Stover v. Eycleshimer*, 4 Abb. Ct. of App. An assignment of a play before it is written is invalid and no title or interest passes to the assignee. *Daly v. Stetson*, 54 Supr. Ct. 202, 10 St. Rep. 453, following *Field v. Mayor of New York*, 6 N. Y. 179. An assignment by a patentee of a right to use an invention upon a certain class of implements operates only for a license, in the absence of express words, the interest of the licensee is not assignable. *Tuttle v. La Dow*, 54 Hun, 149, 26 St. Rep. 829, 7 Supp. 277.

An inventor may not only bind himself by an assignment of a present completed invention, but may obligate himself thereby to transfer subsequent improvements or discoveries made by him. *Magnolia Anti-Friction Metal Co. v. Singly*, 42 St. Rep. 893, 17 Supp. 251. An attempted assignment by the sheriff of such fees as he may become entitled to from the State or county for public services thereafter to be rendered, is inoperative and void. *Bowery National Bank v. Wilson*, 122 N. Y. 478. An assignment by an attorney of a share of the profits which he may realize in an action, providing it shall be a lien on said money so held, entitles the assignee to look to the fund realized on execution for satisfaction of his lien, and to authorize an order directing the setting apart for him of his share by the sheriff. *Muller v. The Mayor of New York*, 23 Civ. Pro. R. 261, 29 Supp. 1096. A client or principal for whose benefit a wrong is done by an attorney and who ratified the wrongful act, cannot, by taking an assignment of the sufferer's cause of action against the attorney, maintain an action against his own subordinate for damages caused by his own instructions. *Baker v. Secor*, 4 Supp. 303, 22 St. Rep. 97.

Where a shipper collected the value of goods destroyed by fire, while in the custody of a carrier, from two insurance companies

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by virtue of which they became entitled to subrogation to his claim against the carrier, a subsequent assignment of such claim to one of them will be ineffectual. *Platt v. Pennsylvania R. R. Co.* 11 Supp. 632. A fire policy may be assigned by parol and delivery where there is a valuable consideration for its transfer. *Lienkauf v. Calman*, 110 N. Y. 50. The beneficiary in a life insurance policy may assign his claim after the company has refused to pay. *Mcagher v. Life Union*, 47 St. Rep. 588. Possession of a lawful insurance policy is not necessary to the validity of an assignment of it. *Baker v. Crosby*, 11 Supp. 575, 33 St. Rep. 757. The rule in *Eadie v. Slimmon*, 26 N. Y. 9, that a life policy in favor of a wife and children is not assignable was followed in *Beer v. Sangor*, 17 Week. Dig. 340.

In the following cases the effect of chapter 248 of the Laws of 1879, with reference to the assignment of policies upon the life of a husband for the use and benefit of the wife and in regard to their assignment, are considered: *Spencer v. Myers*, 73 Hun, 274; *Harvey v. Van Cott*, 71 Hun, 394, 55 St. Rep. 32; *The Connecticut Mut. Life Ins. Co. v. Van Campen*, 11 Supp. 103; *Travelers' Ins. Co. v. Heeley*, 60 St. Rep. 151, 28 Supp. 478; *Miller v. Campbell*, 140 N. Y. 457, 55 St. Rep. 787, affirming 51 St. Rep. 596.

An action may be maintained in equity by the assignee of collateral which the maker of a usurious note gave with the note to secure a delivery of the note and the collateral to himself upon payment of the amount that was advanced upon the note and the collateral. *Dickson v. Valentine*, 24 St. Rep. 957, 6 Supp. 540. Claims of tenant of the owners for damages to their goods caused by water leaking from a bank are assignable. *Butts v. Mackay Co.* 55 St. Rep. 137. In an action to enjoin the continuation of a nuisance on adjoining premises, where the plaintiff, pending the action, transfers the property affected by the nuisance, the right of action passes to his transferee and the latter is entitled to be substituted as plaintiff. *Nickerson v. Crawford*, 25 Abb. N. C. 91. An action by an abutting owner against an elevated railroad to recover damages for loss of rental value of plaintiff's premises, is not one for a personal injury within § 1910, prohibiting the assignment of cause of action for personal injury, as it is defined by § 1343 of subdivision 9. *Birch v. Metropolitan, etc. Ry. Co.* 8 N. Y. Supp. 325, cited Abb. N. C. note page 304, 29

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N. Y. St. Rep. 318. Money collected by the government from a foreign nation by treaty or otherwise and paid to its citizens as indemnity for loss or injury, caused by the action of a foreign government, is an interest legally capable of being assigned by the owner of the property destroyed or injured, even before his own government has taken any steps toward securing to him an indemnity for his loss. *Taft v. Marsily*, 120 N. Y. 474, 31 St. Rep. 584, affirming 47 Hun, 175.

All causes of action for injuries to rights of property survive to personal representatives and are therefore assignable. *Bennett v. Wolfolk*, 80 Hun, 390. The assignability or survivability of things in action have frequently been held to be convertible terms, and perhaps furnish as clear and intelligible a rule to determine what injuries to property rights or interests are meant by the statute as it is possible to lay down. *Morenus v. Crawford*, 51 Hun, 89, citing *People v. Tioga Common Pleas*, 19 Wend. 73; *Zabriskie v. Smith*, 13 N. Y. 322; *Bracket v. Griswold*, 103 N. Y. 425. A contract which by its express terms is binding upon the parties and the legal representatives of the parties is assignable. *Walton v. Rafel*, 7 Misc. 663, 58 St. Rep. 807. Also a covenant and a bill of sale of the saloon business whereby the covenantor bound himself not to engage in the same business within half a mile of the bargained premises for a period of five years, where the sale of such business is made in connection with the covenant. *Greite v. Hendrick*, 24 Supp. 546. An assignment under a seal of a claim for rent being valid as against the lessor, the lessee has no legal interest to inquire into the circumstances under which it was made. *O'Brien v. Smith*, 37 St. Rep. 41, 13 Supp. 410. An indebtedness on a building contract is a proper subject of oral assignment. *Harris v. Dolmetch*, 12 St. Rep. 456. A contract to build entered into by a corporation is assignable, the matter of such a contract involving no personal relation or confidence between the parties. *New England Iron Co. v. Gilbert Elevated R. Co.* 91 N. Y. 153. A contract to receive and pay for goods to be manufactured, may be assigned so as to transfer to the assignee all the benefits thereof. *Rochester Lantern Co. v. Stiles & Parker Press Co.* 47 St. Rep. 842, reversing 40 St. Rep. 851, 16 Supp. 781. A right of action for the wrongful taking and conversion of personal property is assignable even though the assignor apparently retains title to the property. Such an assign-

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ment is as much an election of remedies as if the assignor had commenced an action for conversion, and thereafter neither he nor those in privity with him could maintain an action to recover the property. *Baumann v. Jefferson*, 53 St. Rep. 116, 4 Misc. 147.

A covenant against incumbrances in a conveyance of real estate is not personal to the covenantee, but may be taken advantage of by his assigns. *Coleman v. Bresnahan*, 28 St. Rep. 208. A person holding a claim individually cannot assign it to himself as executor where there is not an actual appropriation of the money to be derived from claims of the estate. *Schreyer v. Holborrow*, 26 Hun, 468, 63 How. 228, distinguishing *Scranton v. Farmers' Bank of Rochester*, 24 N. Y. 424. An overseer of the poor may receive an assignment of a claim against a third person, from a person who is chargeable to the public, as indemnity for expenses incurred during her sicknesses and in her burial, and may receive and enforce such claim by action brought in his official capacity. *Church v. Fanning*, 44 Hun, 302. A counterclaim in favor of defendant against an assignor which accrued after the assignment, but before notice to defendant, will be allowed. *Faulknor v. Swart*, 8 N. Y. Supp. 239, 55 Hun, 261. The right to re-enter for breach of a condition subsequent is not assignable or enforceable by one not vested with the reversionary estate. *Kelly v. Smith*, 45 St. Rep. 49, 18 Supp. 214.

It seems that a right of action against an officer of the corporation to enforce his statutory liability for a debt of the corporation by reason of the filing of a false report, is penal in its nature and cannot be assigned. *Torbett v. Godwin*, 27 Abb. N. C. 444, 62 Hun, 407, 42 St. Rep. 323, 17 Supp. 46. Whether the accounts sued on by an assignee were assigned for a valuable consideration or not, is immaterial as a defence by the debtor while the claims were of a character that could be assigned under § 1910. *Deach v. Perry*, 6 Supp. 940. The legal effect of an assignment is discussed in *Greenwood v. Marvin*, 111 N. Y. 423.

SUB. 2. WHAT CLAIMS ARE NOT ASSIGNABLE.

An assignment of a policy before it is written is invalid. *Daly v. Stetson*, 10 St. Rep. 453. The benefits of a contract for personal services, where the services require performance by the contracting party personally, cannot be assigned. *Martin v. Platt*, 5 St. Rep. 284. A right of action for a personal tort is not as-

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assignable. *Pulver v. Harris*, 52 N. Y. 73; *Gardner v. Adams*, 12 Wend. 297; *People v. Tioga Common Pleas*, 19 Wend. 73. A right of action for injuries to the person is not assignable, even when the injuries involve a breach of contract. *Purple v. H. R. R. Co.* 4 Duer, 74; *Hodgman v. Western R. R.* 7 How. 492. Assignment of a mere contingent possibility, not coupled with an interest, as in a bounty afterward to be voted, would be void as against public policy. *Decker v. Saltzman*, 1 Hun, 421, affirmed, 59 N. Y. 275.

Nor a policy of insurance taken out by a married woman, upon the life of her husband, for the benefit of herself and children, during the life of husband. *Eadie v. Slimmon*, 26 N. Y. 9; *Barry v. Equitable, etc. Co.* 59 N. Y. 587; *Barry v. Sanger*, 17 Week. Dig. 340. Or an endowment policy payable on a certain date to the wife is not assignable. *Brummor v. Cohn*, 86 N. Y. 11. A policy payable to the wife on the death of the husband, or at a certain date, if he be then living, is not assignable by the wife. *DeFonge v. Goldsmith*, 46 Super. Ct. 131. It was also held that a right to re-enter for breach of condition subsequent was not assignable before the breach. *Nicoll v. N. Y. & E. R. R. Co.* 12 N. Y. 121. Nor a right of dower before death of the husband apart from the land. *Moore v. Mayor*, 8 N. Y. 110; *Elmendorf v. Lockwood*, 57 N. Y. 322; *White v. Wager*, 25 N. Y. 328; *Merchants' Bank v. Thompson*, 55 N. Y. 7. A special guaranty is not assignable until a right of action has arisen thereon. *Evansville Bank v. Kauffman*, 24 Hun, 612.

In the following cases, chapter 248 of the Laws of 1879, with reference to the assignment of policy upon the life of a husband for the benefit of the wife is considered and the assignment held invalid: *Brick v. Campbell*, 122 N. Y. 337, 33 St. Rep. 520, reversing 8 St. Rep. 98; *Baron v. Brummer*, 100 N. Y. 372. See, also, *Miller v. Campbell*, 140 N. Y. 457, 55 St. Rep. 787, affirming 51 St. Rep. 596.

As to cases in which such assignments have been held valid see last subdivision.

SUB. 3. WHO HAS POWER TO ASSIGN CLAIMS.

One partner, after the dissolution of a firm, can assign all the interest of the firm in a judgment, although he cannot bind his late partner by covenants contained in the assignment. *Bennett*

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v. Buchan, 61 N. Y. 222, 5 Abb. (N. S.) 412, 53 Barb. 578; *Hemingway v. Poucher*, 18 Week. Dig. 371. A surviving partner may assign assets of late firm. *Pinckney v. Wallace*, 1 Abb. 82. One partner may assign a claim due the firm. *Everit v. Strong*, 7 Hill, 585, affirming 5 Hill, 163. As to the rights of partners to make a general assignment, see *Loewenstein v. Flaurand*, 11 Hun, 399; s. c. 82 N. Y. 494. As to assignment by one partner of his interest in the partnership, see *Menagh v. Whitwell*, 52 N. Y. 146. See, also, *Morss v. Gleason*, 64 N. Y. 204. A married woman may assign her cause of action for the seizure of her separate property on an execution against her husband. *Buckley v. Wells*, 33 N. Y. 518. And a husband may assign to his wife. *Seymour v. Fellotes*, 77 N. Y. 178. An assignee for the benefit of creditors may assign a claim for the purchase-money of property sold by him on credit. *Small v. Ludlow*, 20 N. Y. 155. A partner who owes a debt to the partnership cannot assign such debt. *Van Scoter v. Leferts*, 11 Barb. 140. Nor can one partner assign a bond in which the partners are obligees, unless the assignment relates to matters within the scope of the partnership. *Hudson v. McKensie*, 1 E. D. Smith, 358. One foreign corporation may assign to a resident a claim upon another foreign corporation, upon which it could not itself sue here. *McBride v. Farmers' Bank*, 26 N. Y. 450. And a foreign executor may assign a claim due his testator to another who may sue upon it. *Middlebrook v. Merchants' Bank*, 3 Keyes, 135; *Petersen v. Chemical Bank*, 32 N. Y. 21.

A pledgee of stock who is the apparent owner, may give his assignee a good claim for his advances. *McNeil v. Tenth National Bank*, 46 N. Y. 325. But a widow cannot assign the choses in action of the deceased, unless she is an executrix or administratrix. *Hiedenhimer v. Wilson*, 31 Barb. 663. Nor can a convict assign property after he is sentenced. *Miller v. Finkle*, 1 Parker's Crim. 374, 2 R. S. 71, § 19.

SUB. 4. WHAT CONSTITUTES AN ASSIGNMENT.

No formality is necessary to effect the transfer of the choses in action. Any transaction indicating the intention of the parties that the beneficial interests shall pass from one to the other is sufficient. It may be either by parol or in writing. *Horner v. Wood*, 15 Barb. 371, affirmed, 23 N. Y. 350; *Waldron v. Baker*,

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4 E. D. Smith, 440; *Hooker v. Eagle Bank*, 30 N. Y. 83. An assignment by parol is valid both at law and in equity. *Doremus v. Williams*, 4 Hun, 458. But to render it effectual, the assignor must relinquish all control over the subject-matter. *Rapp v. Blanchard*, 34 Barb. 627. See *Kessel v. Albetis*, 56 Barb. 362. The object of the assignment is immaterial if it is intended to be absolute. *Gardner v. Barden*, 34 N. Y. 433; *Cox v. Wightman*, 4 Hun, 799, affirmed, 66 N. Y. 612. The owner of a cause of action may give it away and his assignee will be entitled to sue upon it. *Richardson v. Mead*, 27 Barb. 178; *Burnett v. Gwynne*, 2 Abb. 79. If the plaintiff has an equitable transfer as against his assignor and holds the legal title to the demand, defendant cannot inquire further. *Sheridan v. The Mayor*, 68 N. Y. 30, reversing 8 Hun, 424.

Possession proves the ownership of a note and that the holder is a holder for value, and this presumption is not rebutted by proof that it was not transferred until over-due. *Mottram v. Mills*, 1 Sandf. 37; *Porter v. Chadsey*, 16 Abb. 146; *Smith v. Shanck*, 18 Barb. 344; *Wiltsie v. Northam*, 3 Bosw. 182; *James v. Chalmers*, 6 N. Y. 209. The rule that a bill payable to order must be transferred by indorsement, applies only to make the instrument negotiable. The transfer by delivery is sufficient to enable the holder to sue upon such a bill or note in his own name. *Van Riper v. Baldwin*, 19 Hun, 344, affirmed 85 N. Y. 618; *Brown v. Richardson*, 20 N. Y. 472. An assignment of the equity of redemption in lands is valid if in writing, signed by the assignor, though not under seal. *Stoddard v. Whiting*, 46 N. Y. 627. So of a lease. *Holliday v. Marshall*, 7 Johns. 211. And a patent right. *Van Ostrand v. Reed*, 1 Wend. 424. A judgment may also be assigned without a seal or even by parol or delivery, if the intent is clear. *Runyan v. Mersereau*, 11 Johns. 534; *Prescott v. Hull*, 17 Johns. 284; *Ford v. Stuart*, 19 Johns. 342; *Mack v. Mack*, 3 Hun, 323; *Fryer v. Rockefeller*, 63 N. Y. 268, affirming 4 Hun, 800. An agreement with an attorney to give him a percentage of a claim for collecting it, may amount to an equitable assignment of that part of the claim. *Fairbank v. Sargent*, 117 N. Y. 320, reversing 21 St. Rep. 874. To the same effect *Brown v. The Mayor*, 11 Hun, 21; *Williams v. Ingersol*, 89 N. Y. 508, affirming 23 Hun, 284. An order drawn by a contractor in favor of a creditor, by its terms payable out of a sum due or to become

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due from the owner under his contract, when such order is given and accepted in payment of the debt, operates as an assignment *pro tanto* of that fund. *Stevens v. Ogden*, 130 N. Y. 182, reversing 54 Hun, 419. See *Duffield v. Johnston*, 96 N. Y. 369.

It is well settled that when, for a valuable consideration from the payee, an order is drawn on a third party payable out of the particular fund due the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund. *Lauer v. Dunn*, 23 St. Rep. 374. Where a particular fund to accrue in the future is designated in the order and the language is ambiguous, evidence of the surrounding circumstances may be resorted to for the purpose of determining whether the intention was that the payment should only be made out of the designated fund or whether the direction to pay was intended to be absolute, and the fund was mentioned only as a means of reimbursement. *Brill v. Tuttle*, 81 N. Y. 454, reversing 15 Hun, 289. As to what constitutes an equitable assignment, cases are numerous. Among the later ones are: *Fairbanks v. Sargent*, 117 N. Y. 320, 27 St. Rep. 411, reversing 21 St. Rep. 874; *Warburton v. Camp*, 14 St. Rep. 755; *Hussy v. Culver*, 6 Supp. 466; *Williams v. Edison Electric Illuminating Co.* 16 Supp. 857; *Ehrichs v. Demill*, 75 N. Y. 370; *O'Neill v. N. Y. C. & H. R. R. Co.* 60 N. Y. 138, reversing 3 T. & C. 399; *Risley v. Smith*, 64 N. Y. 576; *Frost v. Craig*, 9 N. Y. Supp. 437. But a check drawn in the ordinary form not describing any particular fund or using any words of transfer, does not operate as an equitable assignment of funds of the drawer in the drawee's hands until accepted. *Attorney-General v. Continental Life Ins. Co.* 71 N. Y. 325; *Tyler v. Gould*, 48 N. Y. 682; *Winter v. Drury*, 5 N. Y. 525; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324; *Butterworth v. Peck*, 5 Bosw. 341; *Harris v. Clark*, 3 N. Y. 93. So of an unaccepted order. *Noe v. Christie*, 51 N. Y. 270. Or an order payable from any funds that may come in hand even if accepted. *Phillips v. Stagg*, 2 Edw. Ch. 108; *Hutter v. Ellwanger*, 4 Lans. 8. An order to pay out of a particular fund is not an assignment of the fund unless the consideration exists therefor. *Alger v. Scott*, 54 N. Y. 14. A valuable consideration is an essential and necessary element for an equitable assignment, and to make an order or direction to pay effectual as an assignment, it must appear that such consideration was paid therefor. *Tallman v. Hocy*, 89 N. Y. 537. But this does not affect the rule that no

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consideration is necessary to a legal assignment. *Hays v. Hathorn*, 74 N. Y. 486.

A consideration need not be proved. *James v. Chalmers*, 6 N. Y. 209. And inadequacy of consideration makes no difference. *Carnes v. Platt*, 1 Sweeny, 140. And defendant cannot question the consideration of the assignment to plaintiff. *Stone v. Frost*, 61 N. Y. 615; *Peterson v. Chemical Bank*, 32 N. Y. 21. It is a presumption that there was a sufficient consideration. *Eno v. Crooke*, 10 N. Y. 60. And plaintiff is the real party in interest when he has an equitable transfer and holds the legal title. *Freeman v. Falconer*, 45 N. Y. Super. Ct. 383; *Moore v. Robertson*, 25 Abb. N. C. 173.

The plaintiff must have the right of possession and be the legal owner; his ownership must be sufficient to protect defendant from a subsequent action by the assignor. *Hays v. Hathorn*, 74 N. Y. 486, reversing 10 Hun, 511.

SUB. 5. WHAT PASSES UNDER AN ASSIGNMENT.

The assignment of a debt carries with it all collaterals held for it. *Parmelee v. Dann*, 23 Barb. 461. Such as a mortgage given to secure it. *Pattison v. Hull*, 9 Cow. 747; *Jackson v. Blodgett*, 5 Cow. 202; *Langdon v. Buell*, 9 Wend. 80. The transfer of an accessory to a debt does not transfer the debt. *Battle v. Coit*, 26 N. Y. 404. Collaterals cannot be separated from the principal debt and the transfer of a mortgage, which is the incident of the bond, without the transfer of the bond, is a nullity. *Bloomingtondale v. Bowman*, 21 St. Rep. 247. But an assignment of a mortgage to which there is no bond passes to the assignee, the mortgagee's remedy against the land. *Severance v. Griffith*, 2 Lans. 38. A covenant in an assignment of a bond and mortgage, guaranteeing their payment, passes to any subsequent assignee deriving title from the covenantor. *Craig v. Parkis*, 40 N. Y. 181. The right to recover for the unlawful conversion of bonds passes as an assignment of the bonds. *Birdsall v. Davenport*, 43 Hun. 552. An assignment of a note and its avails carries with it the right of action against the assignor's agent for money received by him on it. *Allen v. Broten*, 44 N. Y. 228. In every assignment of the choses in action the assignor impliedly warrants that there is no legal defence to its collection arising out of his own connection with its origin, that the party was competent to contract and the amount was unpaid. *Furniss v. Ferguson*, 15 N. Y. 437; *De-*

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Laware Bank v. Jarvis, 20 N. Y. 256; *Erwin v. Downs*, 16 N. Y. 575. But an assignee of a bond and mortgage takes subject to all equities unless the mortgagor has estopped him. *Davis v. Bechstein*, 69 N. Y. 440. The assignment of a usurious security carries with it the right of resorting to and enforcing the original debt. *Gerwig v. Sitterly*, 56 N. Y. 214.

The assignment of an undertaking given by a defendant in replevin, carries with it the judgment in the action. *Morange v. Mudge*, 6 Abb. 243. And an assignment of a judgment passes a bond and mortgage held as collateral. *Pattison v. Hull*, 9 Cow. 747. So the assignment of a judgment carries with it the debt upon which it was recovered. *Reed v. Lozier*, 48 Hun, 50. But such assignee can only enforce the rights his assignor had. *Waring v. Loder*, 53 N. Y. 581. The assignee of a judgment takes the assignment subject to the equities existing between the original parties. *McWhinnie v. Cameron*, 57 Hun, 463, 38 St. Rep. 792; *Constant v. University of Rochester*, 17 Supp. 363. A partner purchasing and succeeding to the business of a dissolved firm, takes its trade-marks, although not mentioned in the assignment. *Merry v. Hoopes*, 111 N. Y. 415. An assignment of all demands, causes of action, legal or equitable passes a right of action for the accounting. *Helms v. Goodwill*, 64 N. Y. 642, reversing 2 Hun, 410. A general assignment passes an interest in goods that have been levied upon as well as a claim against a foreign government or a deposit in the bank. *Mumper v. Rushmore*, 14 Hun, 591, affirmed, 79 N. Y. 19; *Cram v. Union Bank*, 4 Keyes, 558; *Couch v. DeLa Plaine*, 2 N. Y. 397. And general assignment of all one's property or goods, with all demands for any portion of them, carries a right of action for the conversion of any of the chattels. *McKee v. Fudd*, 12 N. Y. 622; *Sherman v. Elder*, 24 N. Y. 381.

A general assignment for the benefit of creditors passes to the assignee the right of action of the assignor against defendant for participation in fraudulently inducing the assignor to sell goods on credit. *Moor v. McKinstry*, 37 Hun, 194.

ARTICLE II.

WHEN JUDGMENT CAN BE SUED. § 1913.

§ 1913. [Am'd, 1896.] Action upon judgment regulated.

Except in a case where it is otherwise specially prescribed in this act, an action upon a judgment for a sum of money, rendered in a court of record of the

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state, cannot be maintained, between the original parties to the judgment, unless either

1. Ten years have elapsed since the docketing of such judgment; or,
2. It was rendered against the defendant by default, for want of an appearance or pleading, and the summons was served upon him, otherwise than personally; or
3. The court in which the action is brought has previously made an order, granting leave to bring it. Notice of the application for such an order must be given to the adverse party, or the person proposed to be made the adverse party, personally, unless it satisfactorily appears to the court, that personal notice cannot be given, with due diligence; in which case, notice may be given in such a manner as the court directs.

A party may not further vex another with suits upon the cause of action he has once established or upon the judgment. *Badlam v. Springsteen*, 41 Hun, 162. The setting up of a judgment as a counterclaim is not an action upon the judgment within the meaning of this section. A judgment may be set up by way of counterclaim, although an action could not be maintained thereon. *Wells v. Henshaw*, 3 Bosw. 625; *Cornell v. Donovan*, 3 St. Rep. 261; *Clark v. Story*, 29 Barb. 295. Where plaintiff brought the action as assignee of certain judgments, *held*, that not being an original party to the actions in which they were recovered, she was not foreclosed by this section from maintaining an action without first securing leave of the court to commence and prosecute it. *Hedges v. Conger*, 10 St. Rep. 42; *McButt v. Hirsch*, 4 Abb. 441; *Tuffts v. Braisted*, 1 Abb. 83; *Springsteen v. Gillett*, 30 Hun, 265. An executor or administrator may sue on a judgment for the same reason. *Wheeler v. Dakin*, 12 How. 537; *Smith v. Button*, 45 How. 428, affirmed, 2 T. & C. 498. One who has acquired title to a judgment of a court of this State, by virtue of an assignment from a foreign administrator of the judgment-creditor, may maintain an action thereon in his own name without first obtaining leave of the court to sue. *Carpenter v. Butler*, 29 Hun, 251. A judgment of the United States Circuit Court, though docketed in a County Court, still remains a judgment of that court, and an action can be brought thereon without first obtaining leave from the court. *Goodyear Vulcanite Co. v. Frisselle*, 22 Hun, 174. The provisions of § 1913 do not apply to a judgment rendered in a federal court, sitting in New York, but an action may be maintained thereon as if it were a foreign judgment. *Morton v. Palmer*, 14 Supp. 912, 39 St. Rep. 236, 21 Civ. Pro. R. 94.

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Where a justice's judgment has been docketed in the County Court, leave to sue must be obtained from that court. *Lyon v. Manly*, 32 Barb. 51. A proceeding relating to joint debtors is not an action on a judgment. *Baldwin v. Roberts*, 30 Hun, 163; *Lane v. Salter*, 51 N. Y. 1. Nor is an action in the nature of a creditor's bill. *Catlin v. Dougherty*, 12 How. 457.

The bringing of an action upon a judgment without obtaining leave of the court is not a mere irregularity which is waived by the omission of the defendant to raise the objection, but the omission to obtain such leave renders the judgment invalid, and it will be set aside upon the application of an administrator of the deceased judgment-creditor sixteen years after its entry. *Farish v. Austin*, 25 Hun, 430. In *German Savings Bank v. Carrington*, 14 Week. Dig. 475, it is held that where an administrator obtains a judgment upon a former judgment, if leave was necessary to prosecute the suit, the omission to obtain such leave is a matter of pleading. The proper remedy, where an action is brought upon a judgment without leave, is to move to set aside the summons and complaint. On such a motion, leave to sue should not be granted *nunc pro tunc*, but plaintiff should be left to a motion for leave; *Finch v. Carpenter*, 5 Abb. 225; although leave to bring the action may be given *nunc pro tunc*. *Church v. Van Buren*, 55 How. 489. Where there is a conflict of evidence as to amount of a judgment the court will allow suit to be brought. *Montrait v. Hutchins*, 49 How. 105. See *Van Etten v. Hasbrouck*, 4 St. Rep. 803; s. c. 4 St. Rep. 806. Leave may be granted to sue in a court other than that in which the judgment was obtained. *National Mech. Bank v. Usher*, 1 Sweeny, 403. Where the judgment asked to be sued upon is invalid leave will be denied. *Force v. Gower*, 23 How. 294; *Hanover Fire Ins. Co. v. Tomlinson*, 3 Hun, 630; *Fiske v. Anderson*, 33 Barb. 71. A judgment in favor of a plaintiff, upon an issue raised by defendant's answer, is conclusive in an action on such judgment. *Patrick v. Shaffer*, 94 N. Y. 423. It is no defence to an action upon a judgment that defendants were induced to consent to its entry by a promise that it should not be used against them. *Greene v. Hallenbeck*, 32 Hun, 469. See, however, *Richardson v. Trimble*, 38 Hun, 409. In a Justice's Court the summons and judgment entered were in form against two defendants, though one of them was not served with summons, and had not appeared, but judgment was docketed

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only against the defendant who had been served; *held*, that an action on such judgment against the defendant only who had been served, was proper. *Spencer v. Wait*, 9 Civ. Pro. R. 93.

It is not necessary for the assignee of a judgment before bringing an action thereon, to obtain an order of the court permitting him to do so; *Knapp v. Valentine*, 67 St. Rep. 582, 24 Civ. Pro. R. 331, citing *Smith v. Britton*, 45 How. 428; *Wheeler v. Dakin*, 12 How. 533; *Hedges v. Conger*, 10 St. Rep. 42; *Carpenter v. Butler*, 29 Hun, 251; *Freeman v. Dutcher*, 15 Abb. N. C. 431. And the objection that the plaintiff did not obtain leave to sue before bringing the action on the judgment, cannot be raised for the first time at the trial where defendant omitted to plead such failure. *Knapp v. Valentine*, 67 St. Rep. 582, citing *German Savings Bank v. Carrington*, 14 Week. Dig. 475, affirmed by the Court of Appeals, 89 N. Y. 632; *Farish v. Austin*, 25 Hun, 430.

The defendant in an action upon a judgment cannot raise the question as to whether leave to sue should have been obtained under this section before bringing the action, where that defence was not raised by demurrer or answer. A failure to so take objection waives it. *Brush v. Hoar*, 14 Civ. Pro. R. 297.

Section 1913 was designed to prevent a multiplicity of suits and the accumulation of causes, and applies only to courts of record. The same result is reached in Justice's Court by § 3154. *Harris v. Clark*, 65 Hun, 361, 47 St. Rep. 780, 21 N. Y. Supp. 232. A plaintiff may revive his rights by a suit upon the judgment which he may prosecute with the permission of the court, and having obtained a new judgment he is in the same position that he was before the ten years began to run. *Importers and Traders' National Bank of N. Y. v. Quackenbush*, 143 N. Y. 567.

ARTICLE III.

ACTION FOR DISCOVERY ABOLISHED. § 1914.

§ 1914. Ancillary action for discovery abolished.

An action cannot be maintained, to obtain a discovery under oath, in aid of the prosecution or defence of another action.

A bill of discovery is a bill in equity filed for the sole purpose of obtaining discovery to be used in another and independent action. Am. & Eng. Ency. of Law, vol. 2, p. 199.

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The right of a plaintiff in a court of equity to call upon his adversary to make discovery of facts within his knowledge, material to the controversy, has been admitted from the earliest times, and the need for such discovery was the principal source of a jurisdiction of a court. The power to enforce discovery has been found so essential to the administration of justice that it is now being conferred almost universally upon the courts of law and is executed summarily on motion. The need for the ancillary action for discovery being thus obviated, that action has been abolished. Whenever discovery is needed, the courts will enforce it in such a way as shall best subserve the convenience of parties consistent with such completeness of disclosures as necessity requires. *Valentine v. Harbeck*, 22 Abb. N. C. 448.

In proceedings supplementary to execution, an assignee may be made to appear as a witness and produce certain books in his custody. There is nothing in this section which precludes such an examination. *Matter of Examination of Sickel*, 52 Hun, 527, 5 Supp. 703.

This section does not take away the power of a court to grant discovery which will be enforced when necessary to determine the merits of the action. It is no objection that other means of proof exist nor that defendant has not personal knowledge of the facts. When confidential relations exist, full disclosures will be compelled of all matters in which parties have a common interest. *Montrose v. Wanamaker*, 15 St. Rep. 811, 21 Abb. N. C. 478.

ARTICLE IV.

ACTION ON A PENAL BOND. § 1915.

§ 1915. Action upon a penal bond.

A bond in a penal sum, executed within or without the state, and containing a condition to the effect, that it is to be void, upon performance of any act, has the same effect, for the purpose of maintaining an action or special proceeding, or two or more successive actions or special proceedings thereupon, as if it contained a covenant to pay the sum, or to perform the act, specified in the condition thereof. But the damages to be recovered for a breach, or successive breaches, of the condition, cannot, in the aggregate, exceed the penal sum, except where the condition is for the payment of money; in which case, they cannot exceed the penal sum, with interest thereupon, from the time when the defendant made default in the performance of the condition.

Section 1915, under which leave to sue may be granted any creditor, seems to supersede chapter 466, § 9, Laws of 1877. *Pier-*

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pont v. McGuire, 13 Misc. 70, 68 St. Rep. 197, citing *Matter of Stockbridge*, 10 Daly, 33.

A bond taken in the name of the people must be prosecuted in their name — *People v. Clark*, 21 Barb. 214 — unless an assignment is authorized by statute. *Annett v. Kerr*, 28 How. 324, affirmed, 35 N. Y. 256; *People v. Townsend*, 37 Barb. 520; *People v. Laws*, 4 Abb. 292. *Contra*, *Baggott v. Boulger*, 2 Duer, 160. An action may be brought upon an innkeeper's bond in case of breach by the proper officers in the name of the people. *People v. Groat*, 22 Hun, 164. The provisions of the statute requiring an action to be prosecuted in the name of the real party in interest, is inapplicable to a suit on a bond which is, by statute, made to run to the people. *Hoagland v. Hudson*, 8 How. 343. One of two joint obligees in a bond cannot singly maintain an action for a breach of its condition. *Tinslar v. Malkin*, 12 Week. Dig. 530. See *Hees v. Nellis*, 65 Barb. 440. Necessary counsel fees paid in defending an attachment are recoverable as damages under a bond given on issuing an attachment. *Northrup v. Garrett*, 17 Hun, 497. A voluntary bond, without consideration, cannot be enforced against the obligee. *Wilson v. Baptist, etc. Society*, 10 Barb. 308. Sureties on a bond given in legal proceedings, contract with reference to the existing law and practice, and the power of the court to apportion liability accordingly. *Eleventh Ward Savings Bank v. Hay*, 8 Daly, 328, affirmed, 73 N. Y. 609, without opinion. The breach of the condition of a bond is excused when the default is by reason of the act of the obligee. *Grussey v. Schneider*, 55 How. 188; *Hale v. Patton*, 60 N. Y. 233. Where a bond is joint and several an action lies against one or more of the obligors at the option of the plaintiff. *Field v. Van Cott*, 15 Abb. (N. S.) 349. The obligee may sue at law upon a lost bond. *Franceschi v. Marino*, 3 Edw. Ch. 586. Where a bond was given for the benefit of a number of attaching creditors, *held*, one creditor might maintain a suit thereon in his own name. *Pearce v. Hitchcock*, 2 N. Y. 388.

Where a bond is given to indemnify the obligee against a liability to a third person, the latter can sustain no action upon the condition of the bond. *Turk v. Ridge*, 41 N. Y. 201. Where a bond of a trustee and his surety was given to the people of the State of New York for the benefit of those interested in the trust estate, an action on the bond was properly brought in the name

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of the people, they being the trustees of an express trust under the Code. *People v. Norton*, 9 N. Y. 176. A public administrator who has succeeded to the rights of a special administrator, and to whom the bond of the latter has been duly assigned for the purpose of prosecution, may bring an action as public administrator upon the bond, and this is not in conflict with the holding in *People v. Norton, supra*; *Dayton v. Johnson*, 69 N. Y. 419. The surety on the bond of a special guardian is not exonerated by reason of the fact that the infant's interest in the land was contingent and not vested, and, therefore, not subject to be sold under the order of the court. *Dodge v. St. John*, 96 N. Y. 260. In an action on a county treasurer's bond, the defendants were held properly chargeable with interest upon an amount which it appears it was the duty of that officer to pay, but which he failed to pay over at the expiration of his term of office to his successors. *Supervisors of Monroe v. Clark*, 92 N. Y. 391. A bond in bastardy proceedings conditioned that the defendant will appear before the justices at the time and place named, "and not depart therefrom without leave of such justices," held, broken by failure of such defendant to appear on an adjourned day to which the unfinished trial was continued. *People ex rel. Van Aken v. Milham*, 100 N. Y. 273. A bond to pay a specified sum, if a certain attachment "shall be held to be invalid," held only to provide for payment in the event of the attachment being held invalid in the action in which it was issued. *Thompson v. Moriarty*, 6 St. Rep. 311. The rule as to the necessity of an accounting by a guardian before recourse can be had to the sureties on his official bond is, that the court will require an accounting by guardian when that will be necessary or available to establish the extent of the sureties' liability, and is practicable to be had; but where it is a proceeding of no use or advantage to the sureties, and can only result in subjecting them to the burden of a double litigation, it will not be required. *Perkins v. Stimmel*, 42 Hun, 520. See, however, on this point, *Bieder v. Steinhauer*, 15 Abb. N. C. 428, citing *Hood v. Hood*, 85 N. Y. 561. Mere variations from the statutory form may not make void an agreement or security. *Cook v. Freudenthal*, 80 N. Y. 202; *Toles v. Adce*, 84 N. Y. 224.

The condition of a bond of indemnity to a sheriff applies to a levy presumably made under the execution to which it refers. *Alston v. Conger*, 66 Barb. 272. A bond of indemnity given to

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a sheriff *prima facie* extends only to the property previously levied upon; not to other goods subsequently seized under the writ. *Clark v. Woodruff*, 18 Hun, 419; s. c. 83 N. Y. 518. A bond of indemnity to a sheriff, upon seizing goods under an attachment, covers only the risk of taking and detention under the writ, and cannot be construed to cover a detention by the sheriff after the attachment has been vacated by the court. After such vacation the sheriff is bound to surrender the property on reasonable demand and his refusal to do so is an illegal act, which the indemnitors on the bond do not assume to indemnify against. *Bowe v. Wilkins*, 105 N. Y. 522. Where a sheriff takes a bond to indemnify him for making a levy, he cannot recover upon it without showing a strict compliance with its conditions. *Preston v. Yates*, 24 Hun, 534.

In an action upon the bond of overseers of the poor it is essential to show, as against their sureties, not merely that their principal was indebted to the town, but that such indebtedness arose by reason of not accounting for money actually received by them during the term for which the sureties stood bound. *Kellum v. Clark*, 97 N. Y. 390. See decisions cited under §§ 1880 to 1892. A complaint which alleges the execution of the bond and the breach is sufficient if delivery is not alleged. *Lafayette Ins. Co. v. Rogers*, 30 Barb. 491. The several breaches alleged are in the nature of distinct causes of action. *Beach v. Barons*, 13 Barb. 305. The complaint must state the specific breach for which the action is brought. *People v. Brush*, 6 Wend. 454; *Reed v. Drake*, 7 Wend. 345; *People v. Russell*, 4 Wend. 570; *Bostwick v. Van Voorhis*, 91 N. Y. 353. But not on a bond for the payment of money where the creditor is to pay on demand. *Spaulding v. Millard*, 17 Wend. 331. The demand must be averred. *Douglas v. Rathbone*, 5 Hill, 143. Complaint must allege whole amount due in case an election is given. *Howard v. Farley*, 3 Robt. 599.

A surety in a bond of indemnity is not liable beyond the penalty — *Clark v. Bush*, 3 Cow. 151; *Fairlie v. Lawson*, 5 Cow. 424; *O'Shiel v. Degraw*, 6 Cow. 63; *Lewis v. Ball*, 6 Cow. 583; *Percy v. Rubber-tip, etc. Co.* 38 Super. Ct, 428; *Dickinson v. Cook*, 3 Duer, 324 — with interest from the time of the breach. *Brainard v. Jones*, 18 N. Y. 35; *Lyon v. Clark*, 8 N. Y. 148; *Emerson v. Booth*, 51 Barb. 40. It is only on a bond for the recovery of

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money, however, that interest can be added. 8 N. Y. 148, *supra*. Actual damage up to the amount of the penalty thereon and interest, is all that can be recovered in any case. *Beers v. Shannon*, 73 N. Y. 292. The condition in the bond must, under this section, be treated as equivalent to a covenant. This section contains a limitation as to the amount which may be recovered on a bond. *Tillotson v. Martin*, 40 Hun, 316. It is said that in an action on a penal bond the judgment, in form, is for the penalty. The Code has not changed the law in this respect; *Howard v. Farley*, 18 Abb. 260; s. c. 19 Abb. 126; but in *O'Connor v. Such*, 9 Bosw. 318, it is *held*, that the judgment must be for the damages and costs, and not for the penalty. In an action on a bond conditioned that a third person should pay a certain mortgage, the judgment should be that the defendant procure the same to be satisfied by a certain day, or pay the plaintiff the amount thereof. *Farnham v. Mallory*, 3 Keyes, 527. A bond, conditioned for the maintenance of an obligee and his wife during each of their natural lives, is an entire contract, and on a breach, full damages are recoverable as well for the future as the past. *Shaffer v. Lee*, 8 Barb. 412. See *Turner v. Hadden*, 62 Barb. 480.

In *Steinbock v. Evans*, 122 N. Y. 551, 34 St. Rep. 138, it was held that under this section a plaintiff was entitled to recover the penalty of the bond with interest thereon, from the time when the defendant made default in the performance of the condition.

An official bond, though in the ancient form, may now be sued upon as though its condition be even a covenant to pay the sum on performing the act specified in the condition. That is to say, it may be treated as if it were an undertaking. *People v. Dando*, 20 Abb. N. C. 245.

In *Hood v. Hayward*, 124 N. Y. 1, 20 Civ. Pro. R. 47, 26 Abb. N. C. 271, 35 St. Rep. 229, it is said that under the rule now established that interest by way of damages may be allowed, though in excess of the penalty, from the date at which it is determined that there has been a breach. If the condition is to pay money on a day certain, interest will run from that day. If condition is for the performance of an act which is in the nature of an administration bond, interest will run from the date when a competent court adjudicates the breach and fixes the damages. Interest does not run on such a bond from the time of a decree revoking the letters of the executor from his conduct, but only

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from the date of a decree on an accounting establishing the executor's liability and directing him to pay it.

The undertaking of sureties on an official bond that the officer shall faithfully perform his duties, involves the obligation of making correct reports, conforming to the requirements of the statutes, as well as the payment of funds in his custody. *Supervisors of Tompkins v. Bristol*, 99 N. Y. 316. An action upon the bond of a general guardian will not lie against the sureties until there has been an accounting or some other adjustment of the liability, or unless some special circumstances exist to take the case out of the general rule. *Bieder v. Steinhauser*, 15 Abb. N. C. 428, citing *Hood v. Hood*, 85 N. Y. 561.

The sureties on the bond of an executor are not liable for his failure through inability to pay over the amount of his debt to the testator as so much money in his hands. *Baucus v. Barr*, 45 Hun, 582. Where the statute makes it the duty of an officer to pay over certain moneys, a condition in his bond that he will faithfully perform the duties of the office embraces the duty of paying over such moneys and renders his sureties liable. *Mayer of New York v. Goldman*, 125 N. Y. 395, 35 St. Rep. 404. A note as to the necessity for an accounting as a preliminary to suing on the bond of an executor, etc., will be found in 26 Abb. N. C. 299.

While a bond is to be strictly construed for the protection of the sureties whose obligation must appear to a reasonable degree of certainty to be created by its language or provisions, it is still to have the fair import of such language ascertained for the benefit of its obligees. *Bennett v. Draper*, 62 Hun, 524, 42 St. Rep. 921, 17 Supp. 98. Under a bond to pay such part of the indebtedness of the third person as the creditors shall, after due diligence, fail to collect, within one year from date, it was held that the question of due diligence was properly left to the jury, where the facts, although undisputed, were such as to give rise to different opinions in equally intelligent and unbiased minds. *Salt Springs National Bank v. Sloan*, 135 N. Y. 371, 48 St. Rep. 470. The effect of bonds for fidelity of officers or employes is discussed and passed upon in *Union Dime Savings Bank v. Feltz*, 25 Abb. N. C. 357; *John Hancock Mut. Life Ins. Co. v. Lowenberg*, 120 N. Y. 44, 30 St. Rep. 268; *Fourth Nat. Bank v. Spinney*, 120 N. Y. 560, 31 St. Rep. 846.

Where the charter of a village requires its collector to pay

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over taxes collected by him and return the warrant with an itemized account of unpaid taxes, his failure to make a return will authorize an action on his bond to recover the difference between the amount named in the warrant and that turned in by him. *Village of Olean v. King*, 116 N. Y. 355, 26 St. Rep. 715. It is no defence to an action on the bond of a supervisor for school moneys that he made a general deposit of the moneys in good faith with a reputable firm of individual bankers believed to be solvent, and that such firm failed and the money was lost. *Tillinghast v. Merrill*, 77 Hun, 481, 28 Supp. 1089, 60 St. Rep. 549. On the affirmance of this case, 151 N. Y. 135, Bartlett, J., in the opinion of the court discusses the authorities on this subject in this State, and arrives at the conclusion that, in deciding this question upon general principles and in the light of public policy, the rule must be held of strict liability, requiring a public officer to assume the risks of loss, and imposes upon him the duty to account as an auditor for the funds in his custody. Official reports of the treasurer of a society as to moneys received by him, if unimpeached, are conclusive upon the sureties upon his bond for faithful performance. The sureties are not liable for moneys with which their principal charged himself as coming from his predecessor, but which were not turned over to him, and where the person has absconded no demand is necessary before bringing suit upon the bond. *Levison v. Hoffman*, 8 Misc. 583, 60 St. Rep. 582, 29 Supp. 1119. If the obligee of a bond has knowledge that the obligor is dishonest or untrustworthy, and fails to notify the surety thereof before the execution of the bond, he may be charged with fraudulent concealment, which might be effectual to relieve the surety from liability; the mere failure to notify him of refusal of another to become the surety on the bond will not affect the surety obligation or constitute a defence. *Ludekens v. Pscherhofer*, 76 Hun, 548, 58 St. Rep. 241, 28 Supp. 230.

The obligees of a bond given for the faithful discharge of the duties of an officer of a corporation are under no legal obligation to watch over the conduct of that officer and to examine into his accounts at stated periods. *Albany Dutch Church v. Vedder*, 14 Wend. 165; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Board of Supervisors v. Otis*, 62 N. Y. 88; *Bostwick v. Van Voorhis*, 91 N. Y. 353.

Art. 5. Action by Surety or Trustee to Recover Costs.

ARTICLE V.

ACTION BY SURETY OR TRUSTEE TO RECOVER COSTS. § 1916.

§ 1916. Action by surety or trustee to recover costs, etc.

A surety, including a drawer or indorser, may recover, in an action against his principal; and an executor, administrator, or other trustee, may, where the trust estate is insufficient to reimburse him, recover, in an action against the beneficiary whom he represents; his reasonable costs and other expenses, incurred necessarily and in good faith, in the prosecution or defence, by the express or implied consent of the principal or beneficiary, of an action or special proceeding, relating to the demand secured, or to the trust estate, as the case requires. This section does not affect any special agreement relating to those costs and expenses.

This is a substitute for § 3, chapter 314, Laws 1858, with reference to which statute, it is said in *Thompson v. Taylor*, 72 N. Y. 32, that the equitable rule in reference to the allowance of costs to indorsers is not abrogated thereby, and the common-law rule is stated to be that a surety, as between himself and his principal, is equitably entitled to full indemnity against the consequences of the default of the latter. He may call upon him for reimbursement, not only for what he has been called upon to pay in discharge of the obligation for which he was surety, but also of all reasonable expenses legitimately incurred in consequence of such default, and for his own protection, these include expenses reasonably incurred in securing the application of the property of the principal to the payment of the debts in exoneration of the surety. In that case, one being an accommodation indorser upon the notes of a deceased insolvent, gave security to the holders of the notes and obtained authority from them to bring action in their names for the purpose of collecting the notes out of the estate. In so doing he incurred necessary and reasonable costs, and expenses over and above the costs allowed in the judgments. In an action to marshal and distribute the assets of the estate he was allowed such costs and expenses.

Whether or not an executor is entitled to be reimbursed for expenses paid or incurred by him for counsel and attorney's compensation in the prosecution or defence of suits by or against him as such, depends upon the nature of the suit and his good faith. *Matter of Estate of Smith*, 1 Misc. 269, 22 N. Y. Supp. 1067. This section does not relate in any manner to the question whether the costs of the action against the executor or administrator should be charged against him personally. *Supplee v. Sayre*, 51 Hun, 30.

Art. 6. Action on Lost Negotiable Paper.

ARTICLE VI.

ACTION ON LOST NEGOTIABLE PAPER. §§ 1917, 1918.

§ 1917. Action on lost negotiable paper.

Where it appears, upon the trial of an action, that a negotiable promissory note or bill of exchange, upon which the action, or a counterclaim interposed in the action, is founded, was lost, while it belonged to the party claiming the amount due thereupon, he may prove the contents thereof, by parol or other secondary evidence, and may recover or set off the amount due thereupon, as if it was produced. But for that purpose, he must give to the adverse party a written undertaking, in a sum fixed by the judge or the referee, not less than twice the amount of the note or bill, with at least two sureties, approved by the judge or the referee, to the effect, that he will indemnify the adverse party, his heirs and personal representatives, against any claim by any other person, on account of the note or bill, and against all costs and expenses, by reason of such a claim.

§ 1918. The last section qualified.

But where an action is prosecuted or defended by the people of the state, or by a public officer in their behalf, the people, or the public officer, may prove the contents of a lost note or bill of exchange, by parol or other secondary evidence, and may recover or set off the amount due thereupon, without giving any security to the adverse party.

Indemnity is not required if the note was accidentally destroyed. *Scott v. Meeker*, 20 Hun, 161; *Des Arts v. Leggett*, 16 N. Y. 582; *Hoxie v. Kennedy*, 10 St. Rep. 786. Indemnity is not necessary unless the note was negotiable and there is no presumption of negotiability. *Wright v. Wright*, 54 N. Y. 437; *Pintard v. Tackington*, 10 Johns. 103; *McNair v. Gilbert*, 3 Wend. 344. Indemnity must be given before recovery upon a lost negotiable promissory note, even where it was lost before indorsement or negotiation. *Frank v. Wessels*, 64 N. Y. 155. The bond must be conditioned that the principal as well as the sureties will indemnify the defendant. *Howe Machine Co. v. Avery*, 16 Hun, 555. A tender of the bond upon the trial is sufficient. *Brookman v. Metcalf*, 4 Robt. 568. The payee of commercial paper, who has not the possession of it, and cannot surrender it on payment, cannot recover against the maker when it appears that the paper is in the hands of another, who produces it and claims title to it. The giving of a bond as required by this section does not relieve such a plaintiff of his difficulty. *Read v. Marine Bank of Buffalo*, 136 N. Y. 454, 49 St. Rep. 675. Nor does this section apply where a note has been destroyed or to notes not negotiable. *Terwilliger v. Terwilliger*, 27 N. Y. Supp. 284.

CHAPTER XXXI.

ACTION BY OR AGAINST AN UNINCORPORATED ASSOCIATION.

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ARTICLE I.

WHEN ACTION CAN BE MAINTAINED. § 1919

§ 1919. Actions, etc., by or against associations of seven or more persons.

An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

An unincorporated association may be sued in the name of its president or all its individual members may be sued if their names are known to the person desiring to commence the action; where one person or corporation is sued, another or different person upon whom process has not been served cannot be brought in as a sole defendant by way of substitution, and where there is merely

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a misnomer or defect in the designation of the defendant an amendment will be allowed changing the name of the defendant to his correct name; where in such case the president of the association has been served with process the plaintiff will be allowed to remedy the defect and may have an order substituting such president as defendant where the error consists in alleging the fact that it was a corporation. *Munzinger v. Courier Co.* 82 Hun, 575, 24 Civ. Pro. R. 175, 64 St. Rep. 368.

A voluntary association whose purpose is not business, but the benefit and protection of its members, having no power to compel payment of dues, and whose right of membership ceases upon a failure to pay annual subscriptions, is not a partnership. *Laford v. Deems*, 8 Abb. N. C. 344; s. c. 81 N. Y. 507. A social club, though without formal constitution or by-laws, and without purposes of profit or pecuniary advantage, may be held liable, in an action under the statute, as a joint-stock association, or association of seven or more persons having a common interest. In an action against the president as such, the evidence showing a purchase by him while acting as committee for the club, the question should be submitted to the jury whether the credit was given to the club or not. *Ebbinghouser v. North Club*, 4 Abb. N. C. 300. The section is intended, as stated by the codifier's notes, to follow the decisions in *Tibbetts v. Blood*, 21 Barb. 650, and *Dewitt v. Chandler*, 11 Abb. 459, applying the law to any association for business, social or other lawful purposes, including an Odd Fellows' lodge and missionary society, and the concluding sentence applying it to a partnership has been added. The decision in *Corning v. Greene*, 23 Barb. 33, is also intended to be followed, to the effect that the act applied only to cases where the association as such is interested, and not to cases where the interest of each associate is separate. But where the action is against the association, the fact that the liability of the associates may be separate and several should not be an objection, and the section has been framed upon that idea. A joint-stock association, organized under the statute, is a corporation, so that a suit may be commenced against it by summons. It may be sued in the name of its treasurer; or, in other words, for the purpose of suit, the name of the treasurer may be regarded as the corporate name of the association, and an action is not commenced against it until it is sued by its corporate name, or at least by some name

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intended as such. *Shaw v. Cook*, 12 Hun, 173. Such an association is properly sued in the name of its president. The judgment in such an action and the execution is properly against the president as such, and binds the joint property of the association, not the individual property of the president. Where the complaint in such an action alleged that defendant was president of a joint-stock association consisting of seven or more stockholders, and as such president made his promissory note; that when said note became due it was duly presented to the said defendant for payment, etc.; that defendant is, as such president, justly indebted thereon, it is sufficient. It is not necessary to the existence of such an association that there should be any subscription in writing by its members, and although to endure for longer than one year, it is not within the statute of frauds. The statute requires no greater formalities in that respect for its formation than for the formation of an ordinary partnership. Where it appears a meeting of the association was held, a name agreed on, constitution and by-laws adopted, directors and president appointed, and business conducted for a considerable length of time, *held*, the proof was sufficient to establish the existence of the association; and where an action was brought on notes made by the officers of the association and authorized to bind it, which were discounted by plaintiff, it was held not necessary to prove that the money lent was actually applied to the benefit of the association. *National Bank of Schuylerville v. Vanderwerken*, 74 N. Y. 234. State banking associations can sue and be sued as corporations or in the name of the president. *East River Bank v. Judah*, 10 How. 135. Although in *N. Y. Marbled Iron Works v. Smith*, 4 Duer, 362, it is held the statute does not apply to corporations, and in *Masterson v. Botts*, 4 Abb. 130, it was held that fire companies could not sue in the name of their president, under this act. The New York Stock Exchange, being composed of more than seven persons, owning and having an interest in property in common, and who would be liable to an action on account of such ownership and interest, an action is properly brought by a member, in relation to his interest in that property, against the president. *Sewell v. Ives*, 61 How. 54. The president or treasurer of such an association is, under the provisions of the act, for the purpose of an action, to be regarded as a corporation sole.

A member of a joint-stock express company may maintain an

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action against it the same as if he were not connected with the company. *Sanders v. Euling*, 8 Civ. Pro. R. 166; *Westcott v. Fargo*, 61 N. Y. 542. See, also, *Kingsland v. Braisted*, 2 Lans. 17. The act, in effect, gives them the qualities of a corporation, except the right to have a seal. *Waterbury v. Merchants', etc. Co.* 50 Barb. 157. A defendant cannot be held in one suit in two capacities on different claims; for instance, as president of an association and individually. *Warth v. Radde*, 18 Abb. 396. An association is not liable to a maker of an accommodation note, made for the benefit of the association, although the maker has paid the note. *Crater v. Barringer*, 45 N. Y. 545. The associates are not necessary parties to an action against the association by the name of its president under the statute, even though the words "and others" have been inserted in the complaint. *Olery v. Brewin*, 51 How. 92. The object of the provision specifying the officers of the association against whom actions are to be brought, was to secure the service of papers upon the representative of the association, and in that way prevent a judgment from being obtained against it without its knowledge; service on its chief officer secures such notice and, where an association had no such officers as president or treasurer, service on the chairman and presiding officer of the association is sufficient. *Hathaway v. American Mining Stock Exchange*, 31 Hun, 575. An action may be brought by the individual members of an unincorporated association, in their own names, on behalf of themselves and their associates, it not appearing that such association has a president or treasurer, and it seems even if it does have a president or treasurer they may still so sue. *Bloete v. Simon*, 12 Civ. Pro. R. 114. Where a member of a voluntary association took the title to a tract of land for its benefit, under an agreement that it should be improved by him and conveyed in lots as required by the board of directors, *held*, that an action would lie, by the shareholders, against his heirs and personal representatives. *Barker v. White*, 58 N. Y. 204. An action cannot be maintained against the president of an unincorporated association, to restrain the carrying out of a resolution of suspension against a member. The statutes apply only to suits having in view a remedy against the joint property and effects. *Rorke v. Russell*, 2 Lans. 244. See *McMahon v. Rauhr*, 47 N. Y. 67. But in *Fritz v. Muck*, 62 How. 69, it is held, without referring to these cases, that an action may

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be maintained against the president of a joint-stock association, by an expelled member, to compel his restoration, and in such suit the propriety of the expulsion may be reviewed.

In an action against the officers of a joint-stock company, both the president and treasurer cannot be sued; the statute is in the alternative. *Schmidt v. Gunther*, 5 Daly, 452. An action may be maintained by a member of a benevolent society to recover from the funds, money alleged to be due him by reason of sickness. *Poultney v. Bachman*, 62 How. 466. The president may sue a member to recover an assessment on stock, where the articles of the association authorize the directors to recover. *Bray v. Farwell*, 3 Lans. 495. Where the members agree each to pay a ratable proportion of the cost of improving real estate belonging to the association, one member may be sued by the others for his share. *Troy Iron, etc. Factory v. Corning*, 45 Bar. 231. Where the members of an association make a deposit to secure the performance of the agreements, reserving the right of withdrawal, one member may sue alone to recover his deposit. *McCullough's Lead Co. v. Strong*, 56 N. Y. 660. An action may be maintained by a member of a joint-stock association against the association, in the name of its president or treasurer, for maintaining a private nuisance, and judgment may be enforced against the association and its members. *Saltsman v. Shults*, 14 Hun, 256. Persons who have become members of an unincorporated association are proper plaintiffs in an action against persons who have committed a breach of trust, or have fraudulently or negligently injured the property of the association. *Dennis v. Kennedy*, 19 Barb. 517. An unincorporated association may be sued by an individual member for any breach of its obligations to him. *Winter v. Haman*, 5 Civ. Pro. R. 194. The president may bring an action against its treasurer, also a member, to recover moneys of the association, converted by him to his own use, and an order of arrest may issue in such an action. *Strebe v. Albert*, 1 City Ct. 376.

A member of an unincorporated society may bring an action against it for money loaned; the action may be brought against the president or treasurer; having the power to borrow money, the society may issue obligations for its payment. *Mangels v. Schoen*, 2 City Ct. 192. Dissolution of a voluntary association for moral, benevolent and social purposes should be adjudged on

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complaint of members, if at all, only when the association has ceased to answer the ends of its existence, and no other mode of relief is possible. Where an association possesses the power to punish the improper conduct of its members, one complaining of such conduct must resort to the remedies provided by the association before applying to the courts for relief. *Lafond v. Deemes*, 81 N. Y. 507. In case of violent dissensions and irreconcilable differences between the members of a voluntary association, judgment will be rendered at the suit of one or more members against all the others, dissolving the society. *Fischer v. Raab*, 57 How. 87. On dissolution the trustees have no right to exchange any of the assets for stock in a corporation; they must convert them into money. *Frothingham v. Barney*, 6 Hun, 366. A club is not a joint-stock company nor a mutual benefit society. *Irwin v. Forbes*, 11 Barb. 587. The rights of the associates in club property, and the means of enforcing them, do not differ materially from those of partners. *McMahon v. Rauhr*, 47 N. Y. 67. A social club is founded on contract, and the obligation of that contract cannot be violated. *Austin v. Scaring*, 16 N. Y. 123. A member of a club has a right to recourse to the courts if, having exhausted all his appeals to the club tribunals, he is expelled in a manner contrary to the rules and by-laws; *White v. Brownell*, 4 Abb. (N. S.) 162; or if he is expelled without notice. *Fritz v. Muck*, 62 How. 69. As to the right of appeal to the courts by a member of a club, see *Hutchinson v. Lawrence*, 67 How. 38; *Loubat v. Leroy*, 15 Abb. N. C. 1. Where plaintiff is described as president of an association, and alleged that he prosecutes for its benefit, that is sufficient. *Root v. Price*, 22 How. 372. Without such an allegation it would not appear to be the action of the association. *Hallett v. Harrower*, 33 Barb. 537. The complaint should allege that the association consists of seven or more persons; *Tiffany v. Williams*, 10 Abb. 204; but it need not state the names of the associates, or set forth the object of the association. *Dewitt v. Chandler*, 11 Abb. 459; *Olery v. Brown*, 51 How. 92; *Tibbets v. Blood*, 21 Barb. 650. An association of this character is liable in an action for libel. *Van Aernam v. McCune*, 32 Hun, 316.

Where a voluntary unincorporated association was sued in its own name, but the summons was served on its president, an amendment of the title of the action will be allowed on the terms

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of changing the title of the action to that of the president. *McKane v. Democratic General Committee*, 21 Abb. N. C. 89, 14 Civ. Pro. R. 126. In an action against the president of an unincorporated association, the president as such and not the association is the party defendant. *Brooks v. Hocy*, 18 Civ. Pro. R. 98. An action lies on behalf of an unincorporated association, to enjoin a part of its members from procuring an incorporation of a society under the name used by the association. *McGlynn v. Post*, 21 Abb. N. C. 97. The dissatisfied members of a voluntary association cannot by incorporating themselves deprive the voluntary association of the right of using its own name. *Black Rabbit Ass'n v. Munday*, 21 Abb. N. C. 99. An unincorporated association or firm cannot maintain an action to enjoin a rival from imitating its name, if the name includes a designation of it as a banking company, for that is a false representation that it is incorporated. *Kochler v. Sanders*, 21 Abb. N. C. 95. Where an association is formed under articles of agreement which provide for the exercise of the privileges provided by statute, the association will be presumed to have been organized under such provision. The question as to whether an association of individuals constitutes a corporation is determined by the question whether the body so created possesses the powers usually enjoyed by such corporation, and whether the body exercises the privileges of corporate action. *People ex rel. Platt v. Wemple*, 52 Hun, 434.

The defendant may raise the question by answer, as to whether the president of a voluntary association has the capacity to sue. *Ruhl v. Ware*, 22 St. Rep. 423. A promissory note payable to the trustees and treasurer of a local assembly, an unincorporated body, belongs to that body and may be sued upon by its treasurer. *Wicks v. Monihan*, 54 Hun, 614, 28 St. Rep. 39, 13 Supp. 156. After a local assembly has been deprived of its charter, an action may be maintained by its president or treasurer to recover an indebtedness due the association. *Wicks v. Monihan*, 130 N. Y. 232, affirming 54 Hun, 614. Where an action was brought against five persons alleged to constitute a joint-stock association, to recover for personal injuries, no proof of the existence of such an association was given, but it appeared that a company of that name was incorporated under the laws of another State and was carrying on business, it was held that the action was improperly brought against the defendant, it should have been brought

 Art. 2. Effect of Death of Party, or of Misnomer. Art. 3. Effect of Judgment.

against the corporation. *Demarest v. Flack*, 32 St. Rep. 675, 11 Supp. 83. In *McCabe v. Goodfellow*, 21 Civ. Pro. R. 65, the question was discussed as to what evidence was sufficient to justify a finding as to what constituted an unincorporated association. Same case is reported on appeal to the General Term, 15 N. Y. Supp. 377, 39 St. Rep. 941. It was held on appeal 133 N. Y. 89, 44 St. Rep. 253) that under the provisions of this section, plaintiff must allege, and prove and it must be found, that all the members of the association were liable, either jointly or severally, to pay his claim; that the individual liability of the members of such an association on contracts made by the association, its officers or committees, depends on the principles of the law of agency; that authority to create such liability will not be presumed or implied from the existence of the general power to transact business or promote the objects for which the association was formed, except where the debt contracted was necessary for its preservation. Such an association is not in any sense a partnership.

ARTICLE II.

EFFECT OF DEATH OF PARTY, OR OF MISNOMER. §§ 1920, 1924.

§ 1920. Proceedings in case of death, etc.

The death or legal incapacity of a member of the association does not affect an action or special proceeding, brought as prescribed in the last section. If the officer, by or against whom it is brought, dies, is removed, resigns, or becomes otherwise incapacitated, during the pendency thereof, the court must make an order, directing it to be continued by or against his successor in office, or any other officer, by or against whom it might have been originally commenced.

§ 1924. When objection of misnomer, etc., of parties not available.

Section 1813 of this act applies to an action brought, as prescribed in the last section but one, against the members of any association, which keeps a book for the entry of changes in the membership of the association, or the ownership of its property; and to each book so kept.

ARTICLE III.

EFFECT OF JUDGMENT. § 1921.

§ 1921. Effect of judgment; execution thereupon.

In such an action, the officer against whom it is brought cannot be arrested; and a judgment against him does not authorize an execution to be issued against his property, or his person; nor does the docketing thereof bind his real property or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same, out of any personal

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property belonging to the association, or owned, jointly or in common, by all the members thereof, omitting any direction respecting real property.

See *National Bank of Schuylerville v. Vanderwerker*, 74 N. Y. 234, cited under § 1919, on points involved in this section as well as that under which it is cited. No judgment goes against the treasurer individually; he cannot be arrested; no execution can be issued upon the judgment against his property or person; it does go against the personal property of the association only. *Duncan v. Fowes*, 32 Hun, 12. A judgment against three individuals, with the title "trustees" added to their names, is not a judgment against the unincorporated society of which they are trustees, even if the subject of the suit affects such society. To recover a judgment against an unincorporated association, the action must be against the president or treasurer as such, and the execution must require the sheriff to satisfy it out of any personal property belonging to the association. *Bruns v. Kane*, 12 Civ. Pro. R. 86.

ARTICLE IV.

SUBSEQUENT ACTION AGAINST MEMBERS, AND STATUTE OF LIMITATIONS. §§ 1922, 1923.

§ 1922. Subsequent action against members.

Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as prescribed in the last three sections, another action, for the same cause, shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon. After such a return, the party in whose favor the execution was issued, may maintain an action, as follows:

1. Where he was the plaintiff, or a defendant recovering upon a counterclaim, he may maintain an action against the members of the association, or, in a proper case, against any of them, as if the first action had not been brought, or the counterclaim had not been made, as the case requires; and he may recover therein, as part of his damages, the costs of the first action, or so much thereof as the sum, collected by virtue of the execution, was insufficient to satisfy.

2. Where he was a defendant, and the case is not within subdivision first of this section, he may maintain an action, to recover the sum remaining uncollected, against the persons who composed the association, when the action against him was commenced, or the survivors of them.

But this section does not affect the right of the person, in whose favor the judgment in the first action was rendered, to enforce a bond or undertaking, given in the course of the proceedings therein.

§ 1923. This article permissive; effect upon statute of limitations.

This article does not prevent an action from being brought by or against all the members of an association, except as prescribed in the last section. Where

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an action is brought against the members of the association, as prescribed in subdivision first of the last section, the time between the commencement of the action by or against the officer, and the return of the first execution issued upon the final judgment rendered therein, is not a part of the time limited by law, for the commencement of the second action.

In *Park v. Spaulding*, 10 Hun, 128, it was held that the members of a club formed for social and recreative purposes, assuming a name, under which they incur liabilities, may be sued jointly for such indebtedness, and each continues liable so long as he remains a member and until he notifies those dealing with it of his withdrawal. This holding is, however, criticized in *Flagg v. Swift*, 25 Hun, 623, where it is held, that when an unincorporated association, consisting of seven or more members, has been formed, and has adopted by-laws and elected a treasurer, an action cannot be maintained against the individual members thereof, upon a debt due from the association, unless an action has been first brought against its president or treasurer under this section, citing *Witherhead v. Allen*, 4 Abb. Ct. App. Dec. 628, and 4 Abb. N. C. 300, *supra*, on the point. In *Humbert v. Abeel*, 7 Civ. Pro. R. 417, the latter case is distinguished, and it is held that a person having a claim against an unincorporated association may bring an action against the members thereof without first suing the association. A judgment against the president of the association does not preclude individual members sued for the debt from contesting their liability. *Allen v. Clark*, 65 Barb. 563. The members are individually liable for the debts of the association. *Moore v. Brink*, 4 Hun, 402.

The right to maintain an action against the members of an unincorporated association without first obtaining a judgment against the association is expressly given by § 1923, and it is not, therefore, necessary for the plaintiff, as a condition to the maintenance of such action, to first bring suit against the association's president and treasurer. *Schwartz v. Wechler*, 49 St. Rep. 145, 20 Supp. 861, 2 Misc. 67, 23 Civ. Pro. R. 21; following *Humbert v. Abeel*, 7 Civ. Pro. R. 417; *Hudson v. Spaulding*, 6 N. Y. Supp. 877, and not following *Flagg v. Swift*, 25 Hun, 623. A creditor at his option may sue the associates without first bringing his action against the president or treasurer. *Winchester v. Coleman*, 45 St. Rep. 217, 5 N. Y. Supp. 394.

CHAPTER XXXII.

ACTIONS BY OR AGAINST CERTAIN COUNTY, TOWN AND MUNICIPAL OFFICERS.

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ARTICLE I.

ACTION BY TAXPAYER AGAINST A PUBLIC OFFICER. § 1925.

§ 1925. [Am'd, 1892.] Action by a taxpayer against a public officer.

An action to obtain a judgment, preventing waste of, or injury to, the estate, funds, or other property of a county, town, city or incorporated village of the State, may be maintained against any officer thereof, or any agent, commissioner, or other person, acting in its behalf, either by a citizen, resident therein, or by a corporation who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or incorporated village, or any public officer.

Section 1, of chapter 301, Laws of 1892, reads as follows:

SECTION 1. Section one of chapter six hundred and seventy-three of the laws of eighteen hundred and eighty-seven, entitled, "An act to amend chapter five hundred and thirty-one of the laws of eighteen hundred and eighty-one, entitled, "An act for the protection of taxpayers," is hereby amended so as to read as follows:

§ 1. All officers, agents, commissioners and other persons acting, or who have acted, for and on behalf of any county, town, village or municipal corporation in this state, and each and every one of them, may be prosecuted, and an action or actions may be maintained against them to prevent any illegal official act on

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the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation by any person or corporation whose assessment, or by any number of persons or corporations, jointly, the sum of whose assessments shall amount to one thousand dollars, and who shall be liable, to pay taxes on such assessment or assessments in the county, town, village or municipal corporation to prevent the waste or injury of whose property the action is brought, or who have been assessed or paid taxes therein upon any assessment or assessments of the above-named amount within one year previous to the commencement of any such action or actions. Such person or persons, corporation or corporations, upon the commencement of such actions, shall furnish a bond to the defendant therein, to be approved by a justice of the supreme court or the county judge of the county in which the action is brought, in such penalty as the justice or judge approving the same shall direct, but not less than two hundred and fifty dollars, and to be executed by any two of the plaintiffs, if there be more than one party plaintiff, providing said two parties plaintiff shall severally justify in the sum of five thousand dollars. Said bond shall be approved by said justice or judge and be conditioned to pay all costs that may be awarded the defendant in such action if the court shall finally determine the same in favor of the defendant. The court shall require, when the plaintiffs shall not justify as above mentioned, and in any case may require two more sufficient sureties to execute the bond above provided for. Such bond shall be filed in the office of the county clerk of the county in which the action is brought and a copy shall be served with the summons in such action. If an injunction is obtained as herein provided for, the same bond may also provide for the payment of the damages arising therefrom to the party entitled to the money, the auditing, allowing, or paying of which was enjoined, if the court shall finally determine that the plaintiff is not entitled to such injunction. In case the waste or injury complained of consists in any board, officer or agent in any county, town, village or municipal corporation, by collusion or otherwise, contracting, auditing, allowing or paying, or conniving at the contracting, audit, allowance or payment of any fraudulent, illegal, unjust or inequitable claims, demands or expenses, or any item or part thereof, against or by such county, town, village or municipal corporation, or by permitting a judgment or judgments to be recovered against such county, town, village or municipal corporation, or against himself in his official capacity, either by default or without the interposition and proper presentation of any existing legal or equitable defences, or by any such officer or agent, retaining or failing to pay over to the proper authorities any funds or property of any county, town, village or municipal corporation, after he shall have ceased to be such officer or agent, the court may, in its discretion, prohibit the payment or collection of any such claims, demands, expenses or judgments, in whole or in part, and shall enforce the restitution and recovery thereof, if heretofore or hereafter paid, collected or retained by the person or party heretofore or hereafter receiving or retaining the same, and also may, in its discretion, adjudge and declare the colluding or defaulting official personally responsible therefor, and out of his property, and that of his bondsmen, if any, provide for the collection or repayment thereof, so as to indemnify and save harmless the said county, town, village or municipal corporation from a part or the whole thereof; and in case of a judgment the court may, in its discretion, vacate, set aside and open said

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judgment, with leave and direction for the defendant therein to interpose and enforce any existing legal or equitable defence therein, under the direction of such person as the court may, in its judgment or order, designate and appoint. All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state are hereby declared to be public records, and shall be open, subject to reasonable regulations to be prescribed by the officer having the custody thereof, to the inspection of any tax-payer. This section shall not be so construed as to take away any right of action from any county, town, village or municipal corporation, or from any public officer, but any right of action now existing, or which may hereafter exist in favor of any county, town, village or municipal corporation, or in favor of any officer thereof, may be enforced by action or otherwise, by the persons hereinbefore authorized to prosecute and maintain actions; and whenever by the provisions of this section an action may be prosecuted or maintained against any officer or other person, his bondsmen, if any, may be joined in such action or proceeding and their liabilities as such enforced by the proper judgment or direction of the court; but any recovery under the provisions of this act shall be for the benefit of and shall be paid to the officer entitled by law to hold and disburse the public moneys of such county, town, village or municipal corporation, and shall, to the amount thereof, be credited the defendant in determining his liability in the action by the county, town, village or municipal corporation or public officer. The provisions of this act shall apply as well to those cases in which the body, board, officer, agent, commissioner or other person above named has not, as to those in which it or he has jurisdiction over the subject matter of its action.

It will be noticed that there are two separate and independent provisions giving the right of action to a tax-payer, the one part of the Code of Procedure, the other an independent statute.

There is also a provision for an investigation by petition in addition to the two statutes above cited; this is as follows: Section 3, of chapter 685, Laws of 1892, being chapter 17 of the General Laws:

§ 3. Investigation of expenditures of towns and villages.

If twenty-five free-holders in any town or village shall present to a justice of the supreme court of the judicial district in which such town or village is situated, an affidavit, stating that they are free-holders and have paid taxes on real property within such town or village within one year, that they have reason to believe that the moneys of such town or village are being unlawfully or corruptly expended, and the grounds of their belief, such justice, upon ten days' notice to the supervisor, and the officers of the town disbursing the funds to which such moneys belong, or the trustees and treasurer of the village, shall make a summary investigation into the financial affairs of such town or village, and the accounts of such officers, and, in his discretion, may appoint experts to make such investigation, and may cause the result thereof to be published in such manner as he may deem proper.

The costs incurred in such investigation shall be taxed by the justice, and

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paid, upon his order, by the officers whose expenditures are investigated, if the facts in such affidavit be substantially proved and otherwise, by the freeholders making such affidavit. If such justice shall be satisfied that any of the moneys of such town or village are being unlawfully or corruptly expended, or are being appropriated for purposes to which they are not properly applicable, or are improvidently squandered or wasted, he shall forthwith grant an order restraining such unlawful or corrupt expenditure, or such other improper use of such moneys.

Section 1925 became part of the Code at the time of its enactment to take effect December 1st, 1880, except as amended by chapter 524 of the Laws of 1892. The amendment consists in the addition of the word "corporation" giving the same powers to a corporate body as to a citizen, with reference to maintaining an action.

The statutory provision which follows was as enacted chapter 161, Laws of 1872. It was amended by chapter 526, of the Laws of 1879. The original act was repealed, Laws of 1880, chapter 245, § 1, subd. 28; chapter 435, Laws of 1880, amends the act of 1872, as amended by the act of 1879. Again, by chapter 531, Laws of 1881, the provisions were substantially re-enacted. Again, chapter 672, of the Laws of 1887, amends the act of 1881, chapter 531. Chapter 301, of the Laws of 1892, enacted the law as it now stands and is given in the text in *Hills v. Peckskill Savings Bank*, 26 Hun, 161, and in note to this section in Throop's Code the question is suggested as to the effect of the various repealing acts. This question, however, seems to be unimportant in view of the fact that as the act now stands, chapter 301, Laws of 1892, it covers all the matters included in former act and subordinates former acts on the subject. How far this chapter conflicts with, repeals or subordinates § 1925 is a serious and perhaps an important question. It is desirable and in fact necessary that any action that may be brought shall conform to the provisions of both acts. As they do not seem to be in direct conflict, this is, perhaps, possible and enables an action to be brought so as to conform to both statutes.

The legislative intent in the passage of the act of 1872 was to provide ample remedy and protection to the tax-payers against all wrongful acts to their prejudice, of the officers and agents of a municipal corporation, affecting not only its property rights, but its credit, and embraces within its purview every process or means by which the corporation can be charged pecuniarily, or the tax-

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able property within its limits burdened. An action is sustainable under the statute by a tax-payer of a town against commissioners thereof, appointed under the Railroad Act, to restrain the threatened and unauthorized issuing of town bonds. An allegation by plaintiffs that they are residents and tax-payers liable to assessment and taxation within the town as such, and owners of real and personal property liable to taxation at the time of the occurrences mentioned in the complaint, is sufficient. *Ayres v. Lawrence*, 59 N. Y. 192; *Metzger v. Attica and Arcade Ry.* 79 N. Y. 171. A tax-payer has the right to bring an action in equity under this section to have a tax-roll adjudged illegal and void. In such an action the court has full power to inquire, *dehors* the record, as to the validity of the claim or claims for which the tax is assessed. *Sherman v. Trustees of Clifton*, 27 Hun, 390. It does not authorize an action by a tax-payer against a *bona fide* holder of town bonds, issued under an act of the Legislature, in which it is sought to have the bonds so issued, canceled and declared void. *Alford v. Syracuse Bank*, 34 Hun, 143, 98 N. Y. 599. But it is held, an equitable action is maintainable under the statute to restrain the negotiation or payment, and compel the cancelation of railroad bonds illegally issued. *Metzger v. Attica, etc. R. R. Co.* 79 N. Y. 171; *Comins v. Supervisors*, 64 N. Y. 626. The tax-payer has only a standing to prevent waste or injury. If the action is in reality for the benefit of an individual, it cannot be sustained. *Hull v. Ely*, 2 Abb. N. C. 440. If the proceedings of the officers of a municipal corporation are not authorized by law, it would seem to imply "a waste or injury" to the funds or estate. *Latham v. Richards*, 12 Hun, 361. Under the statute any tax-payer may maintain an equitable action to vacate the audit of an illegal claim which a board of audit had no authority or jurisdiction to audit, or where the audit was fraudulent or collusive, and to restrain the collection of a tax therefor. *Osterhoudt v. Rigney*, 98 N. Y. 222.

The rule that the acts of a board of audit within its jurisdiction are, in the absence of fraud and collusion, final and conclusive and cannot be questioned collaterally, has not been changed by statute. *Osterhoudt v. Rigney*, 98 N. Y. 222. It is said in Abbott's Annual Digest, 1885, page 240, that the Tax Payers Act was intended to reach cases of official misconduct and not to sustain an action to enjoin a public work on the ground that it is

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prosecuted without previous proceedings to provide compensation. *Ottendorfer v. Brooklyn Bridge Co.* 13 Daly, 16. The act does not enable a tax-payer of a town to enjoin the board of supervisors from collecting moneys which have been fairly already adjudged to be due, without fraud or collusion, upon the bonds of a town, or, unless a defence, not already fully considered, is presented. *Lee v. Supervisors of Jefferson*, 62 How. 201. One showing no other right than as a tax-payer cannot maintain an action in equity against the official custodian of the proceeds of a tax, on the ground of illegality of payment, to restrain their application to the purposes for which the tax was raised. *Kilbourne v. St. John*, 59 N. Y. 21. The same rule is laid down in *Comins v. Board of Supervisors of Jefferson Co.* 64 N. Y. 626, affirmed, 3 T. & C. 296. *Moore v. Smedley*, 6 Johns. Ch. 27, held that an injunction could not issue in such case. A tax-payer may bring an action to restrain an illegal official act on the part of the county treasurer affecting said town, irrespective of the consequences of such violation, the statute assuming that any illegal official act may be injurious, and allowing an injunction simply because of the illegality. *Warrin v. Baldwin*, 105 N. Y. 534. An unsuccessful bidder, at a sale by a city of a ferry franchise, held entitled to bring an action under the statute to set aside and cancel the sale to another person on the ground that it was irregular and conducted in violation of law. *Starin v. The Mayor*, 42 Hun, 549, reversed, 112 N. Y. 206.

The right to maintain an action under this act is not confined to cases where, before its passage, an equitable action could have been brought by the town for the same relief. *Osterhoudt v. Rigney*, 98 N. Y. 221, affirming 27 Hun, 167. A tax-payer's action will not lie to restrain the commissioners of docks from removing the plaintiff from city property for non-payment of rent, where they are acting in good faith in so doing. Such an action will only lie to prevent waste or injury to the funds of the city or an illegal official act. *Rogers v. O'Brien*, 1 App. Div. 397, 37 N. Y. Supp. 358, 72 St. Rep. 747. The action of the aqueduct commissioners in letting a contract to one who was not the lowest bidder cannot be made the ground of a tax-payer's action, unless fraudulent conduct on their part is shown. *Terrell v. Strong*, 14 Misc. 258, 35 N. Y. Supp. 1000, 70 St. Rep. 676.

In the action under chapter 531, Laws of 1881, the plaintiff

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must give a bond as in such act specified; such bond must be in the form prescribed by the act and must be under seal. A compliance with §§ 620 and 621 of the Code of Civil Procedure, as to security, does not obviate the necessity of complying with this statute. Where a motion is made to dissolve an injunction granted under the act, without the giving of such a bond upon the commencement of the action, the court, at Special Term, has power in a proper case to permit such bond to be filed *nunc pro tunc*. If the court intervene to enjoin an officer in what he claims to be his official duty, a plain case should be established by the party asking such interference. It is not sufficient for the plaintiff in such an action to show that the act he seeks to enjoin is one of doubtful propriety. *Tappan v. Crissey*, 64 How. 496.

It is said in note, 22 Abb. N. C., page 86, that this is a new branch of the law of municipal corporations and one of very general importance, allowing an individual tax-payer who observes a violation of law on the part of those charged with the administration of the public interests, but interposes by an action in his own name so as to obtain for the municipality such relief as might have been obtained by the municipality had the suit been brought in its own name.

It is held in *Lutes v. Briggs*, 64 N. Y. 404, reversing 5 Hun, 67, that the act did not authorize a tax-payer to bring an action under it where the statute under which the officers were proceeding directly pointed out another mode of relief. It is no objection to a proceeding under the statute providing for an investigation into the financial affairs of a town or village to prevent waste of public moneys, that the petitioner had other remedy. *Matter of Town of Eastchester*, 53 Hun, 181, 6 N. Y. Supp. 120. In proceedings instituted under such petition, no costs can be awarded by the county judge. *Matter of Hill v. Sheldon*, 55 Hun, 44. Under the rule laid down in *Roosevelt v. Draper*, 23 N. Y. 318, before this act was passed, a tax-payer had no remedy against an abuse of municipal property nor had the State the right to interfere or abridge the property rights of municipal corporations. *People v. Ingersoll*, 58 N. Y. 1; *People of the State of New York v. Fields*, 58 N. Y. 491. It is said in *Latham v. Richards*, 12 Hun, 360, appeal dismissed, 72 N. Y. 607, that this act was probably intended to change the doctrine of *Roosevelt v. Draper*, 23 N. Y. 318.

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The object of the act of 1875 was to give an additional remedy for the plundering of a municipality by faithless officers and to authorize the State to pursue funds wrongfully abstracted from their treasuries, into the hands of officials or other persons who had wrongfully obtained them; *People of the State of New York v. New York, Manhattan Beach R. R. Co.* 84 N. Y. 565, 22 Hun, 95; and to secure the protection of public property and subordinate the acts of the officials in its disposition, or appropriation, to the restraints of the law, and it should be liberally construed. *Starin v. Mayor*, 42 Hun, 549, 4 St. Rep. 588, reversing 1 St. Rep. 544. This case was reversed on another point, 112 N. Y. 206.

It was only intended to protect against the fraud or bad faith of the officer, or to restrain illegal action on his part, not as a shield to the officer from the effect of his own folly or to enable a taxpayer to try a question of fraud between the officer and those dealing with him. *Zeigler v. Chapin*, 126 N. Y. 342. To sustain a tax-payer's action to set aside a contract on the ground of fraud or waste, knowledge of the fraud of the municipality by the contracting party must be shown. *Parfitt v. Kings County Gas and Illuminating Co.* 12 Misc. 278, 33 Supp. 1111, 67 St. Rep. 814.

The object of an action under chapter 301 of the Laws of 1892, must be to prevent an illegal official act or to prevent waste or injury to any property, funds or estate of a county, town, village, or municipal corporation. Fraud or bad faith amounting to fraud brings a case within the operation of this statute. The prevention of realization of money by the city is equivalent to waste of the public funds of the municipality. *Adamson v. Union Railway Co.* 56 St. Rep. 214, 74 Hun, 3. Dykman, J., in the opinion, gives a history of legislation on this subject showing that it has been progressive. He says: "Instead of an abridgement of its scope or a relaxation of its rigor, the Legislature has extended its sweep and augmented its severity, and that is a sufficient admonition against any circumscription of operation of this statute; all the statutes have been in the interest of the public and aimed at frauds and wrongful acts of public officers and agents."

An action to recover real property is not within the purview of the act, and an action not maintainable to recover lands of a town, the title to which it is claimed had been wrongfully acquired through the interference of its servants and agents with the action

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of a town meeting, they procuring the passage of an act authorizing the conveyance of the lands for a grossly inadequate sum by the action of persons not legal or qualified voters. *People v. N. Y. and M. B. R. Co.* 84 N. Y. 565, affirming 22 Hun, 95.

An action will lie to prevent a municipality from paying improper expenses incurred by its officers. *West v. City of Utica*, 71 Hun, 540, 24 Supp. 1075, 54 St. Rep. 911. And to restrain city officials from entering into contract of employment with one who has not passed the civil service examination or restraining the payment of the salary of such an employe out of the funds of the city. *Peck v. Bellknap*, 130 N. Y. 394, reversing 55 Hun, 91, 28 St. Rep. 467, 8 Supp. 265, 3 Supp. 872. See *Rogers v. City of Buffalo*, 22 Abb. N. C. 144, 3 Supp. 671. It may be maintained against a county treasurer who has paid himself fees allowed by law upon sales of land for unpaid taxes without any audit of his claim. *Warrin v. Baldwin*, 105 N. Y. 534, reversing 35 Hun, 334. And to restrain officers from making a settlement for a nominal consideration of a collectible judgment recovered by a city. *Standart v. Burtis*, 46 Hun, 82. A taxpayer of a village has a standing in court which enables him to bring an action to restrain the collection of an annual tax levy and even if he does not make out a case sufficient to authorize the setting aside of the tax warrant, but only shows the officers of the village are threatening to pay illegal claims from the funds they are raising, he is entitled to some relief, and if any of the items contained in such levy and attacked by the plaintiff are not valid claims against the village, it is improper to dismiss the complaint. *Squire v. Preston*, 82 Hun, 88, 63 St. Rep. 495, 31 Supp. 174.

It seems to be held in *Case v. County of Cayuga*, 88 Hun, 59, 68 St. Rep. 632, that an action under § 1925 will lie to restrain the board of supervisors of the county from consenting to the operation of a street railway in front of real estate of the county. An action to prevent the execution of a contract for electric subways, which is uncertain, illegal and wasteful, may be maintained. *Armstrong v. Grant*, 56 Hun, 226. So, also, against the supervisors and collector of a town to prevent the payment of claims against a town allowed by the supervisors of the county in excess of the amount allowed by the board of town auditors. *McCrea v. Chahoon*, 54 Hun, 577, 28 St. Rep. 242. Although a mere

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error of judgment as to price on a proposed purchase by a municipality may not suffice to sustain this action, yet an excessive valuation so large as to indicate that the officers acting are not exercising the same care, fidelity and caution as would be expected from an individual purchasing for himself with his own money, will sustain such an action. *Winkler v. Summers*, 22 Abb. N. C. 80. Where the act of supervisors is unauthorized and illegal, it is said in *People v. Board of Supervisors of Queens*, 43 St. Rep. 665, 131 N. Y. 468, that they and every aggrieved tax-payer could arrest the proceedings by an action instituted under this statute. An action will lie to prevent payment of compensation to an inspector of plumbing on the ground that his appointment was illegal. *Stearns v. Tew*, 6 Misc. 404. An action may also be maintained to restrain the payment of town bonds illegally issued, and is not subject to the objections which would defeat an action dependent upon the general equity power of the court. *Strang v. Cook*, 47 Hun, 46, 14 St. Rep. 150.

The action will only lie where fraud or collusion or bad faith is alleged and proved. *Boone v. McGucken*, 23 Civ. Pro. R. 115, 50 St. Rep. 901, citing *Ziegler v. Chapin*, 126 N. Y. 342. Where no fraud is imputed, a tax-payer cannot enjoin the application to the payment of bonds of money raised for that purpose on the claim that the bonds are invalid. *Calhoun v. Millard*, 121 N. Y. 69. An excessive allowance or an erroneous conclusion by a board upon the facts does not constitute waste or injury to the property or the town. *Osterhout v. Rigney*, 98 N. Y. 222, affirming 27 Hun, 167. The decision in *Clark v. Sheldon*, 106 N. Y. 104, 10 Supp. 357, 32 St. Rep. 36, is held not to preclude an action to cause misapplied taxes to be refunded and to be applied to pay town bonds. *Vinton v. Board of Supervisors*, 18 St. Rep. 435, 2 Supp. 367.

It is the duty of the court to see to it that he who intends to champion public acts is actuated by public motives and that he is not making use of the power of the court to accomplish some private end. *Kimball v. Hewitt*, 22 St. Rep. 311, 15 Daly, 124, affirming 17 St. Rep. 743. But it is no objection to the maintaining of such an action by one who acts within its language and complies with its terms, that he has a personal interest in the matter aside from that of a tax-payer. *Starin v. Mayor*, 42 Hun, 549. The action cannot be maintained to restrain the settlement by

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overseers of the poor of actions brought for violation of the excise law. *Olp v. Leddick*, 38 St. Rep. 123, 14 Supp. 41. Where no fraud is shown and no injury resulted, the action cannot be maintained. *Cobb v. Ramsdell*, 36 St. Rep. 457. It will not lie to restrain a city from making a contract with a corporation to light its streets, where the bid of such corporation was the lowest one and was made in good faith. *Boyle v. Grant*, 36 St. Rep. 207, 12 Supp. 801.

A tax-payer cannot maintain an action to set aside the grant of a franchise by a city to a street railway company on the ground that the franchise was granted as a matter of favoritism and for a less compensation than the city would have obtained from another company, unless such grant was secured by fraud or corruption. The right of a city to give its consent as a condition precedent to the construction of a street railroad therein is properly in a city within chapter 301, Laws of 1892. *Adamson v. Nassau Electric Railroad Co.* 68 St. Rep. 851, 89 Hun, 261, 34 Supp. 1073, reversing 12 Misc. 600, 33 Supp. 732, 67 St. Rep. 554.

Where an act declares that the bonds shall, in the hands of *bona fide* holders, be binding on the town, such an action cannot be maintained upon the ground that the requisite consents were not, in fact, obtained. *Spaulding v. Arnold*, 24 St. Rep. 879. In *Hills v. Peckskill Savings Bank*, 101 N. Y. 490, reversing 26 Hun, 161, it was held that such an action was not maintainable on the ground that the town had elected to compromise rather than to contest the validity of the bonds, and was estopped. An agreement to pay public money to a monopoly, knowing it to be such and intending to favor it as such, is an illegal contract, and any action in executing or performing the same is an illegal official act within the meaning of the statute. *Boon v. City of Utica*, 5 Misc. 391. It is held in *Parfitt v. Ferguson*, 3 App. Div. 176, that a provision in a contract that no other gas or electric light company may extend its mains or pipes within the town during the term of the pending agreement, is void as tending to create a monopoly, and although such a provision does not cause any immediate waste of the funds of the town, it constitutes an illegal official act to prevent which a tax payer may sue. An action to restrain the governing body of a city from official action clearly within its power and discretion, and without any charge or allegation of fraud, collusion, corruption or bad faith,

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cannot be maintained though it be averred that such intended action was unwise and without due regard to economy. *Talcott v. City of Buffalo*, 125 N. Y. 280, 34 St. Rep. 871; *Sweet v. City of Syracuse*, 60 Hun, 28, 38 St. Rep. 607, 14 Supp. 421, affirmed, 129 N. Y. 316.

The action cannot be maintained where no facts are stated showing waste or injury to city property either present or threatened; certainly not where the evident purpose of the action was to try the title to an office. *Johnston v. Garside*, 65 Hun, 208, 47 St. Rep. 526. It will not lie to restrain the submission to the General Term upon an agreed statement of facts, of a claim of a town within a county against the board of supervisors, where the defendants have acted in good faith and in the belief that the submission contained a full, fair and truthful statement of all the facts upon which the controversy depended, and there was no intent to defraud any tax-payer, unless acts complained of were beyond the authority of the board and wholly illegal and void. *N. Y. C. & H. R. R. Co. v. Maine*, 71 Hun, 417, 54 St. Rep. 384.

A tax-payer may maintain an action to prevent payment of a claim by a member of the board of supervisors for legal services out of the county fund. *Beebe v. Supervisors of Sullivan*, 64 Hun, 377, 19 Supp. 629, 46 St. Rep. 222. In *Armstrong v. Grant*, 56 Hun, 226, it was held the action could be maintained to prevent the signing of the contract by municipal authorities. The fact that a city engineer, knowing a contractor had not properly performed his work, has recommended payment therefor, is not enough to sustain an action by the property-owners to restrain the payment and avoid the assessment, where there is no finding that the recommendation has been adopted, or the common council is about to adopt it, or that action has been taken to do any wrong or improper act. *Union Cemetery Association v. McConnell*, 124 N. Y. 88, 35 St. Rep. 47.

The action cannot be maintained where it does not appear that the plaintiff will be specially damnified by the acts he seeks to restrain. In such case he is without standing in attempting to avoid or restrain corporate act of the municipality. *Wilkins v. Mayor*, 9 Misc. 610, 30 Supp. 424. In *Robinson v. Gilroy*, 30 Supp. 411, an injunction against the sale of a ferry franchise by the city on the ground of the omission to fix the minimum rate of ferriage, is denied at the suit of the tax-payer. Where discre-

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tionary powers as to the method of making public improvements are vested in a city by its charter, the exercise of such discretion, so long as it acts within the scope of its powers, cannot be interfered with. *Bell v. City of Rochester*, 30 Supp, 365, 61 St. Rep. 721. A supplemental complaint was allowed where before an injunction was granted, part of the evil sought to be prevented had been done. *Latham v. Richards*, 15 Hun, 129. An allegation in a complaint that a certain official act by the common council of a city is illegal, is not an averment of an issuable fact, but simply the statement of a legal conclusion, and so is not admitted by a demurrer to the complaint. *Talcott v. City of Buffalo*, 125 N. Y. 280. A complaint is not sufficient which contains simply averments that officials of a municipality have entered into and propose to carry out a contract for the purchase of property, within their authority but at an extravagant price and without the exercise of proper care and prudence. In the absence of allegations of any fraud, collusion or bad faith on the part of the officials, and this although the complaint contains averments of fraud on the part of the vendor. In addition thereto, it must be averred that the officials, in the face of explanation and knowledge of the fraud, persist in carrying out the contract. *Ziegler v. Chapin*, 126 N. Y. 342, 37 St. Rep. 490, affirming 37 St. Rep. 185.

Where such an action is brought to vacate audits of town accounts made by a town board of audit, on the ground of irregularity, illegality or fraud, and to restrain the levying of a tax for their payment, the persons in whose favor the audits were made are proper and necessary parties. The enumeration in the act of the persons against whom actions under it may be brought, does not dispense with the necessity of joining all other persons who will be directly affected by the judgment and are necessary parties to a complete determination of the controversy. *Osterhout v. Rigney*, 98 N. Y. 222. In like case it is proper for the plaintiff to bring an action against such parties only as it is needful to restrain in order to prevent waste and injury, and where each claimant is interested in a single resolution of the board of supervisors, in which all the audits were embraced, joinder of all the claimants is authorized by §§ 442 and 447 of the Code and by the recognized practice of the court. *McCrea v. Chahoon*, 54 Hun, 577. Such an action cannot be maintained against bondholders alone where it is brought to restrain payment of certain bonds issued

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by a town. It can only be maintained against the town, its officers or agents, and the bondholders should be joined as proper parties. *Calhoun v. Millard*, 16 St. Rep. 46. In an action brought to enjoin an issue of bonds to raise funds with which a board of commissioners are to carry on a public work, the city and the board are necessary parties; contractors, land owners, etc., are not. *Hurlbut v. Banks*, 1 Abb. N. C. 157, affirmed, 67 N. Y. 568. A municipal corporation cannot be made a party to a taxpayer's action. Such an action is maintainable only upon proof that the officers of the municipal corporation have done or are about to do some act the commission of which involves some waste of or injury to the corporate property, funds or estate, or the performance of some illegal official act. *Wilkins v. The Mayor of New York*, 9 Misc. 610. In such case, all persons materially interested in the subject of a suit ought to be made parties, all persons who have any substantial, legal or beneficial interest in the subject-matter and who are materially affected by the decree. *Standart v. Burtis*, 46 Hun, 82.

An injunction *pendente lite* may be granted. *Hurlbut v. Banks*, 1 Abb. N. C. 157, 52 How. 196, affirmed, 67 N. Y. 568; *Ayers v. Lawrence*, 59 N. Y. 192. But an injunction will not be granted in an action against a town supervisor to restrain the payment of bills presented by the highway commissioners, where plaintiff fails to prove the bills were not audited by the board of auditors, or that there was no legally constituted board, or that the audit was illegal or that the bills were unjust, inequitable or fraudulent, or that the commissioners had failed to make their reports to the board, or that payment of the bills would work harm or injury to plaintiff. *Warren v. Van Nostrand* 21 St. Rep. 960.

Complaint—Alleging Excessive Allowance by Town Board of Auditors.

SUPREME COURT.

Teunis P. Osterhoudt, a resident and taxpayer of
the town of Kingston,

agst.

John Rigney, Elias S. Cutler, supervisor of the
town of Kingston, and the Board of Supervisors
of the County of Ulster.

98 N. Y. 222.

The complaint of the above-named plaintiff respectfully shows to the court that he is and has been for many years a resident and tax-

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payer in the town of Kingston, county of Ulster, and has been and is assessed for and liable to pay taxes therein; that the defendant John Rigney was, in the year 1877, and up to the month of March last was, one of the overseers of the poor of the town of Kingston in the county of Ulster; that at the regular meeting of the board of town auditors of the town of Kingston, held in the month of November, 1877, he presented and submitted his bill or account up to that time as such overseer of the poor, to the said board of town auditors, for audit and allowance at \$2,141.21, and for keeping tramps at \$811.25, making together \$2,952.46, the said board of town auditors being at the time duly convened and in regular session for the audit of accounts against said town and having full jurisdiction in the premises; that the board of town auditors examined and passed upon said bill and found many illegal charges and overcharges therein, and on account thereof struck out and disallowed the sum of \$556.37 from his bill as overseer of the poor, thus auditing and allowing said bill at \$1,584.84, and for the same reason struck out and disallowed from his bill for keeping tramps the sum of \$649, thus auditing and allowing the said account for keeping tramps at \$162.25, making the gross sum of disallowances upon both bills the sum of \$1,205.37; that the said defendant John Rigney acquiesced in such audit and allowance and accepted the same, and took no proceedings for its review or correction; that the several amounts so audited were duly raised by assessment and tax upon the said town of Kingston and paid to the said defendant John Rigney or his order, and the said John Rigney executed a receipt or receipts therefor, acknowledging his receipt thereof in full of his said accounts presented to said board for audit; that the board of supervisors of the county of Ulster, at a regular meeting of the said board, held on the 13th day of December, 1866, adopted the following resolution: Resolved, That the board of supervisors of the county of Ulster hereby declare their intention to adopt the provisions of the act entitled "An act in relation to temporary relief of the poor in the county of Livingston, and such other counties as may adopt the provisions of this act," passed May 14, 1845; that thereupon, by virtue of the provisions of the act, chapter 245 of the Laws of 1846, entitled "An act in relation to the temporary relief of the poor," all the provisions of the act aforesaid, in relation to the temporary relief of the poor in the county of Livingston, were extended and applied to the county of Ulster; that under and by virtue of section 3 of said act the overseers of the poor are required to keep a book to be procured at the expense of the town, in which, among other things, they shall enter a statement of all moneys received by them, when and from whom, and on what account received, and of all moneys paid out by them, when and to whom paid and on what authority. And by section 4 the overseers of the poor are required, on the Thursday next preceding the annual meeting of the board of supervisors, to lay the said book before the board of town auditors, together with a just and true account of all moneys received and expended by them for the use of the poor since the last preceding meeting of the board of town auditors. The

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board of town auditors are in and by said section required to compare said account with the entries in the poor book aforesaid and examine the vouchers in support thereof, and audit and settle the same; that the said John Rigney, at a late meeting of the board of town auditors, convened and held November 7, 1878, for the auditing of the town accounts, pursuant to law, presented to the said board of town auditors of the town of Kingston his bill or account as overseer of the poor of the town of Kingston, for moneys expended and keeping tramps, the sum of \$4,325.75; that in said bill or account was included a charge of \$1,100, or thereabouts, for the amount rejected and disallowed by the board of town auditors in 1877, as hereinbefore stated; that he produced no poor book as required by the aforesaid act, and the said board of town auditors did not compare said account with the entries in any such book, nor, as the plaintiff is informed and believes, with vouchers in support thereof, or examined any such vouchers, and that the said board then, as this plaintiff alleges, illegally, improperly, and improvidently, audited and allowed said account at the sum of \$3,725.75; this plaintiff alleges and insists that such audit and allowance was without authority of law, and illegal; that the board of town audit have no authority to supervise or review the action of any previous board of town auditors in regard to the allowance or rejection of any claim or account, or any of the items thereof, nor are they authorized to audit or allow any account for disbursements by any overseer of the poor, without the production of the poor book, as required by the statute aforesaid, and its comparison with said account, and the production and examination of proper vouchers for all expenditures charged in said account; and this plaintiff alleges on information and belief, that many of the items in said bill for disbursements were unsupported by any vouchers, and that the allowance of the said bill to the said defendant John Rigney, at the amount aforesaid, was without authority of law; that the board of town auditors have, as this plaintiff is informed and believes, prepared this certificate as required by law, and have therein included the allowance so made to the defendant John Rigney, as aforesaid, and unless prevented by the injunction order of this court, the said defendants, the board of supervisors of Ulster county, will cause the same to be levied and assessed upon the said town of Kingston, whereby the tax-payers of the said town of Kingston will be greatly wronged and defrauded.

Wherefore, the plaintiff demands the judgment of this court that the said allowance to the said John Rigney of \$3,725.25 is without authority of law, and void, and that the same cannot be legally levied and assessed upon the town of Kingston, and that the defendants, the board of supervisors of the county of Ulster, be enjoined and restrained from causing to be levied and raised upon the town of Kingston the aforesaid sum so certified to the said John Rigney, and that the said defendant Elias S. Cutler, supervisor of the town of Kingston, be enjoined and restrained from paying for, or on account of, said town, the sum so audited to the said John Rigney,

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as overseer of the poor, as aforesaid; and that the plaintiff have such further or other relief or judgment as may be meet and proper, with costs of this action.

M. SCHOONMAKER,
Plaintiff's Attorney.

Complaint to Restrain City Officials from Contracting to Employ One not Passing Civil Service Examinations.

SUPREME COURT — MONROE COUNTY.

William F. Peck, a tax-payer of the City of
Rochester,

agst.

Cornelius R. Parsons, as Mayor of the City of
Rochester; Peter Sheridan, as Clerk of the City
of Rochester; John A. Davis, as Treasurer of
the City of Rochester; The City of Rochester and
George Belknap.

130 N. Y. 398.

The complaint of the above-named plaintiff respectfully shows that the plaintiff is a citizen, resident in the city of Rochester, N. Y., whose assessment upon property in said city amounts to more than one thousand dollars and who is liable to pay taxes upon such assessment in said city, and who has been assessed and paid taxes therein upon an assessment of more than one thousand dollars within one year previous to the commencement of this action.

That the defendant Cornelius R. Parsons is the mayor, the defendant Peter Sheridan is the clerk, and the defendant John A. Davis is the treasurer of said city of Rochester. That on or about the 20th day of August, 1884, the mayor of said city of Rochester, in obedience to the directions of chapter 354 of the Laws of 1883, as amended by chapter 410, Laws of 1884, prescribed certain regulations for the admission of persons in the civil service of said city, which said regulations were duly approved by the New York Civil Service Commission, were duly published and now are and at the times hereinafter mentioned were in force. That by the first of said regulations it was provided that said regulations should apply to all positions in the public service of said city of Rochester, with the following exceptions required by the statutes, namely: all elective officers and the subordinates of the city treasurer and persons employed by or who seek to enter the public service under the board of education.

That by the 4th of said regulations, the civil service of said city of Rochester is, except as above stated, classified as follows: Schedule B, part first, All officers and members of the police and fire departments. Schedule B, part second, All other subordinate officers, clerks and assistants. Schedule D, shall include all persons employed as laborers or day workmen.

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That by the 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th said regulations it is provided that all applicants or persons named for positions in said civil service under Schedule B, parts first and second, shall be examined by a board of examiners, as provided in said regulations, and that appointment to or employment in any position in Schedule B, shall be made from the persons whose names are certified by said board of examiners.

That on the 20th day of December, 1887, the common council of said city of Rochester, adopted a resolution directing the mayor of said city of Rochester to enter into a contract with the defendant George Belknap for the employment of said Belknap to examine all street lamps, electric or gas, and their location, and otherwise perform the duties of a lamp inspector in said city of Rochester, which employment was to be completed on the first day of April, 1888, and under which the said George Belknap was to be paid the sum of \$313.33 in three payments of \$104.44 each on the first day of February, March and April, 1888.

And the city clerk of said city of Rochester was directed to draw orders in favor of said Belknap on the treasury, payable from the lamp fund, at the time and for the amounts respectively as aforesaid.

That said resolution was returned to said common council by the mayor of said city of Rochester with his disapproval on the ground that the same was in violation of said civil service regulations and the laws of the State of New York.

That on the 7th day of February, 1888, the common council of said city of Rochester, at a regular meeting, passed said resolution over the mayor's veto and said resolution remains in force.

That the employment of said George Belknap, directed to be made by said resolution, falls within Schedule B, part second, under said civil service regulations; that said George Belknap has not passed any examination as provided for in said civil service regulations and chapter 354 of the Laws of 1883, and the amendments thereof, and has not been certified as eligible to a position in the civil service of said city of Rochester, by a board of examiners duly appointed to conduct said civil service examinations, and is not eligible to the position in said civil service provided for in said resolution of the common council nor does he come within any of the exceptions provided for in said regulations or the laws of the State.

And plaintiff further alleges, upon information and belief, that unless restrained by this court, the defendant Cornelius R. Parsons, as mayor of said city of Rochester, will enter into the contract with said George Belknap, as directed by said resolution of the common council, the defendant Peter Sheridan, as clerk of said city of Rochester, will draw orders on the treasurer of said city of Rochester in favor of said George Belknap for the sums of money as directed by said resolution of the common council, and the defendant John A. Davis, as treasurer of said city of Rochester, will pay said orders, and that in consequence thereof the funds of said city of Rochester, already raised in part by taxation of the plaintiff's property, will be wrongfully diverted and wasted and plaintiff's property will be subjected to additional taxation.

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Wherefore, plaintiff prays the judgment of this court restraining and enjoining the defendant Cornelius R. Parsons from entering into any contract with said George Belknap as directed in said resolution of the common council, the defendant Peter Sheridan from drawing any orders upon the city treasury under said resolution, and the defendant John A. Davis from paying out any sums of money under said resolution or upon any orders drawn by virtue thereof, and for such other or further relief as to the court may seem just, and that in the meantime a temporary injunction may be issued restraining the defendant as prayed for in this complaint.

JOHN H. HOPKINS,
Plaintiff's Attorney.

Complaint Alleging Unconstitutionality of City Charter.

SUPREME COURT — COUNTY OF ALBANY.

John F. Rathbone and George Douglass Miller,
Plaintiffs,

agst.

John F. Donovan, Jacob Wirth, Jr., Malachi F. Cox, Michael J. Hogan, Theodore P. Bailey, Hugh J. Slaterry, William G. Sheehan, James J. McKiernan, John J. Brady, George W. Smith, Elmer H. Havens, John E. Corscadden, Fred Ebel, George H. Stevens, Joseph A. Clancy, William H. Golden, Charles A. Pritchard, John M. Collins and John Pauly, Members of the Common Council of the City of Albany, and John Boyd Thacher, Edward J. Meegan, Robert Shaw Oliver, William J. Walker and Jacob C. E. Scott, constituting the Board of Police Commissioners of the City of Albany, Defendants.

151 N. Y. 459.

The complaint of the above-named plaintiffs respectfully shows:

First. That the plaintiffs are, and for many years have been, residents and taxpayers of the city of Albany, and that the sum of their assessments in said city of Albany, amounts to one thousand dollars and upwards, and that they are liable to pay taxes on such assessments, and have been assessed and paid taxes in said city upon assessments of the above-named amount within one year previous to the commencement of this action.

Second. That the defendants John F. Donovan, Jacob Wirth, Jr., Malachi F. Cox, Michael J. Hogan, Theodore P. Bailey, Hugh J. Slaterry, William G. Sheehan, James J. McKiernan, John J. Brady, George W. Smith, Elmer H. Havens, John E. Corscadden, Fred Ebel, George H. Stevens, Joseph A. Clancy, William H. Golden, Charles A. Pritchard, John M. Collins and John Pauly are aldermen elected by the electors in the several wards of said city, and as such

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aldermen, are members of the common council of said city of Albany, that the defendants John Boyd Thacher, as mayor of the city of Albany, Edward J. Meegan, Robert Shaw Oliver, William J. Walker and Jacob C. E. Scott, as police commissioners, constitute the board of police commissioners of the city of Albany, and are in possession or control of the police department, the police force and all of its property, station-houses and offices within the city of Albany, as plaintiffs are informed and believe.

Third. That on or about the first day of May, 1896, a certain bill which had been theretofore passed by the Senate and Assembly of the State of New York, and had been under the provisions of the Constitution, referred to the mayor and common council of the city of Albany, and after being disapproved by said mayor and common council, had been returned to the Legislature, was again passed by the Senate and Assembly of the State of New York, and signed by the governor of said State, and filed in the secretary of State's office as an act of the Legislature, being chapter 427 of the Laws of 1896. A copy of the said act is hereto annexed marked "Schedule A," and made a part of this complaint.

Fourth. These plaintiffs are informed, advised and believe, that the said act, chapter 427 of the Laws of 1896, in many respects violates the Constitution of the State of New York and the Constitution of the United States, and is therefore unconstitutional and void; that the mode of election or appointment of police commissioners provided for in the first section of said act, amending section 3 of title 12 of chapter 77 of the Laws of 1870, and the acts amendatory thereof and supplemental thereto, is not authorized by the Constitution of the State of New York, but is forbidden thereby; that the provision in said section that "no person is eligible to the office of police commissioner unless at the time of his election he is a member of the political party or organization having the highest or the next highest representation in the common council" violates the provisions of the Constitution of the State of New York, and also those of the Constitution of the United States, that the provisions in the said law giving certain powers to the police board to be created thereunder, are void for the reason that the election or appointment of the said police board under the provisions of the said act will be, if made, in violation of the Constitution of the State of New York; that the provision that the person who was senior captain on January 1, 1896, shall in case of failure by said board to appoint a chief of police, act as such, and possess all the powers and perform all the duties of chief of police, and receive the salary of chief of police until the board shall make an appointment, is in violation of the Constitution of the State of New York; that the provision that in case of a failure by the board to appoint the captains or sergeants provided for by said act, then it shall be the duty of the chief or acting chief to assign members of the police force to perform such duties until the board shall make such appointment, is in violation of the Constitution of the State of New York; that the provision in said act that no person shall be eligible to appointment as patrolman who is over the age of forty years, is in violation of

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the Constitution of the State of New York; that the provision in said act that on the day of their election, the said board of police commissioners shall assume control of the police department, police force, and all of the property, station-houses and offices within the city of Albany now in the possession of police or police commissioners thereof, and shall succeed to all the rights, duties and liabilities now belonging or appertaining to the said police commissioners, is in violation of the Constitution of the State of New York; and that the entire scheme of the said act, and many other of the provisions thereof, are unconstitutional and void.

Fifth. Plaintiffs further allege upon information and belief, that it is provided by section 19, of title IV, of an act entitled "An act to provide for the government of the city of Albany," being chapter 298 of the Laws of 1883, as amended by chapter 302 of the Laws of 1885, that whenever by the provisions of said act or of any other law, the common council is authorized to itself name or appoint any officer, or the member of any board or commission in the city of Albany, to fill any vacancy by reason of the expiration of term or otherwise in any such office, board or commission, except when it is directed to appoint or designate members of its own body for any position, and except when appointments are made under title 3 of said act, it shall be construed to mean that a proper person to act as such officer or commissioner or member of such board, shall be nominated by the mayor of the city of Albany to the common council thereof, and shall be by said common council rejected or confirmed as in this section above specified, and any vacancy in such office, board or commission shall thereafter be so filled; that under the provisions of said section 19, which has never been repealed, the common council of the said city has no power or right to elect or appoint police commissioners except upon the nomination of the mayor of the city of Albany, and then has only power to reject or confirm such nominations; that if the said act, chapter 427 of the Laws of 1896, shall be deemed or held to be valid, and not in violation of the Constitution of the State of New York or of the United States, that then a vacancy in the office of the said four police commissioners under the provisions of section 6 of said act amending section 8 of chapter 77 of the Laws of 1870, occurred by the cessation and determination of the term of office of the former police commissioners on the first day of May, 1896, and that any police commissioners to be hereafter elected or appointed under the provisions of said act, chapter 427 of the Laws of 1896, will be so appointed to fill a vacancy in such office of police commissioners, and will be subject to the above recited provisions of section 19 of title IV of chapter 298 of the Laws of 1883, and the acts amendatory thereof.

Sixth. That the defendant John F. Donovan is the president of said common council, and that these plaintiffs are informed and believe, that unless restrained by the order or judgment of this court, the said Donovan or some other of the defendants who are members of said common council, acting as president or chairman of the said common council, will declare persons to have been elected or appointed

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as police commissioners, who have not received the votes of a majority of the members of the common council, or of a quorum thereof.

Seventh. Plaintiffs further charge, upon information and belief, that the defendants herein who are members of the common council of the city of Albany as above stated, or some of them, intend and threaten and are about, unless restrained by the order or judgment of this court, to proceed under the said act, and without reference to any nomination to be made by the mayor of said city, to vote for police commissioners, or for two persons as police commissioners, and that the persons who may be elected or appointed, or who may claim to be elected or appointed as police commissioners under the provisions of said act, will claim to constitute the board of police commissioners of the city of Albany.

Eighth. Plaintiffs are informed and believe that the voting for police commissioners by the defendants who are members of said common council, under the provisions of the said act, chapter 427 of the Laws of 1896, will be on the part of said defendants and of each of them, as members of the common council of said city, an illegal official act, inasmuch as the only authority for so voting, will be the said act, chapter 427 of the Laws of 1896, which is unconstitutional and void as above set forth.

Ninth. That under the provisions of section 6 of said act chapter 427 of the Laws of 1896, it is provided that on the day of their election, the said board of police commissioners, meaning the persons to be appointed under the provisions of said act, shall assume control of the police department, police force, and all of the property, station-houses and offices within the city of Albany, now in the possession of the police or police commissioners thereof, as by reference to said section 6 will more fully appear, and that unless they are restrained from so doing, the defendants, John Boyd Thacher, Edward J. Meegan, Robert Shaw Oliver, William J. Walker and Jacob C. E. Scott, or some or one of them, will deliver control and possession of such police department, and all such property, station-houses and offices, to the persons who may be voted for by the defendants, the members of the common council, under the said act.

Tenth. Plaintiffs further allege, upon information and belief, that if the defendants who are members of said common council, shall proceed to vote for police commissioners under the provisions of the said act, chapter 427 of the Laws of 1896, and the persons elected or appointed or attempted to be elected or appointed, under the said act, shall, under the provisions of said act, attempt to exercise the powers therein attempted to be conferred upon the said police commissioners, the same will result in great waste or injury to the property and funds of the said city of Albany; that the payment of the salaries of the acting chief of police and of the members of the police force who may be appointed by the said persons claiming to be police commissioners under the said act, or by the said acting chief of police whose appointment will be illegal because made under an act which is unconstitutional and void, will be made without warrant of any valid or constitutional law, and will, therefore, be a waste of the public funds.

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Wherefore, the plaintiffs demand judgment that the said act, chapter 427 of the Laws of 1896, in so far as it provides in the first section thereof for the election or appointment of police commissioners, and in so far as it provides that no person shall be eligible to the office of police commissioner unless at the time of his election he is a member of the political party or organization having the highest or next highest representation in the common council, and in so far as it provides for the conferring upon the police commissioners thus appointed all of the powers and duties conferred upon said board by the provisions of said act, and in so far as it provides that the said board of police commissioners shall on the day of their election assume control of the police department, police force and all of the property, station-houses and offices within the city of Albany now in possession of the police or police commissioners thereof, and shall succeed to all the rights, duties and liabilities now belonging or appertaining to said police commissioners, and in so far as it provides that the term of office of the present police commissioners of the said city of Albany shall cease and determine on the first day of May, 1896, and in so far as it provides that the person who was senior captain on January 1, 1896, shall, in case of failure by said board to appoint a chief of police, act as such, and possess all the powers and perform all the duties of chief of police, and receive the salary of chief of police until the board shall make an appointment, and in so far as it provides that in case of a failure by the board to appoint the captains or sergeants provided for by said act, then it shall be the duty of the chief or acting chief, to assign members of the police force to perform such duties until the board shall make such appointment, and in so far as it provides that no person shall be eligible to appointment as patrolman from the civil service list who is over the age of forty years, may be adjudged and declared to be unconstitutional and void, and that the said act, chapter 427 of the Laws of 1896, may be adjudged and declared to be wholly unconstitutional and void, and that the defendants who are members of said common council, and each of them may, by order of this court, during the pendency of this action, and by the judgment of this court forever thereafter, be enjoined and restrained from voting for police commissioners under the said act, and from voting at all for police commissioners upon the first Monday after the passage of the said act, or at any other time, and from doing any act under or in pursuance of the provisions of the said act, chapter 427 of the Laws of 1896, and that the defendants who are members of said common council, and each of them, and their successor or successors, may be in like manner enjoined and restrained from declaring any person to have been elected as such police commissioner, who has not received the votes of a majority of the members of the said common council or of the members who are present and voting at any meeting thereof; and that the defendants, John Boyd Thacher and others, constituting the board of police commissioners of said city as above set forth, may be in like manner enjoined and restrained from delivering or surrendering possession or control of the police department, police force, or any of the prop-

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erty, station-houses and offices within the city of Albany, now in the possession of said defendants, constituting said board of police commissioners, to any person or persons who may claim to have been appointed police commissioners under the provisions of the said act, chapter 427 of the Laws of 1896, and that the said defendants who are members of the said common council and their successors, and each of them, may be enjoined and restrained as aforesaid from voting for any persons as police commissioners, who are not nominated to such office by the mayor of the city of Albany under the provisions of section 19 of title IV of chapter 298 of the Laws of 1883, and the acts amendatory thereof, and that the plaintiffs may have such further or other relief in the premises as to the court may seem just and equitable, together with their costs in this behalf sustained.

HALE, BULKELEY & TENNANT,
Attorneys for Plaintiffs.

Bond on Obtaining Temporary Injunction.

(Title as above.)

The above-named plaintiffs having applied or being about to apply for an injunction herein, restraining such of the defendants who constitute the common council of the city of Albany, and each of them, during the pendency of this action, and until the further order of the court, from voting for police commissioners under and pursuant to an act of the Legislature of the State of New York, being chapter 427 of the Laws of 1896, a copy whereof is annexed to the complaint in this action, and from voting at all for police commissioners on the first Monday after the passage of said act or at any other time, and enjoining the said defendants and their successors, and each of them, from voting for any persons as police commissioners who have not been and are not nominated for such office by the mayor of the city of Albany under the provisions of section 19 of title IV, chapter 298 of the Laws of 1883, and the acts amendatory thereof, and from doing any act under or in pursuance of the provisions of said act, chapter 427 of the Laws of 1896, and that the defendants who are members of said common council, and each of them, and their successor or successors, may be in like manner enjoined and restrained from declaring any person to have been elected as such police commissioner, who has not received the votes of a majority of the members of the said common council, or of the members who are present and voting at any meeting thereof, and that the defendants, John Boyd Thacher, Edward J. Meegan, Robert Shaw Oliver, William J. Walker and Jacob C. E. Scott, constituting the board of police commissioners of the city of Albany, may be in like manner enjoined and restrained from delivering or surrendering possession or control of the police department, police force, or any of the property, station-houses and offices within the city of Albany now in the possession of said last named defendants constituting said board of police commissioners, to any person or persons who may claim to have been appointed police commissioners under the provisions of the said act, chapter 427 of the Laws of 1896.

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Now, therefore, We, John F. Rathbone and George Douglas Miller, of the city and county of Albany, do hereby jointly and severally undertake, promise and agree to and with the said defendants, and each of them, to pay all costs that may be awarded the defendants or any of them in such action, if the court shall finally determine the same in favor of said defendants, not exceeding the sum of five hundred dollars, and will also pay to the defendants, and each of them enjoined, such damages, not exceeding the sum of five hundred dollars, as they or either of them may sustain arising or by reason of such injunction, if the court shall finally determine or decide that the said plaintiffs are not entitled thereto; such damages to be ascertained by a reference, or in such other manner as the court may direct.

Dated May 2, 1896.

JOHN F. RATHBONE. [L. S.]

GEO. DOUGLAS MILLER. [L. S.]

Add acknowledgment and verification.

Judgment for Injunction After Trial.

(Title as above.)

The issues in the above-entitled action having been brought on for trial before Mr. Justice Alton B. Parker, at a term of this court, held on the 15th day of May, 1896, at the city of Kingston, and all of the parties to this action having duly appeared by their respective attorneys, and the issues having been duly tried, and the court having made and filed its written decision, bearing date the 15th day of May, 1896.

Now, on motion of Hale, Bulkeley & Tennant, attorneys for the plaintiffs,

It is hereby adjudged and decreed that the act of the Legislature of the State of New York, being chapter 427 of the Laws of 1896, a copy whereof is annexed to the complaint in this action, and each and every part thereof is, and the same hereby is, declared unconstitutional and void.

It is hereby further adjudged and decreed that the defendants who are members of the common council of the city of Albany, and each of them, be and they are hereby forever enjoined and restrained from voting for police commissioners under the said act, and from voting at all for police commissioners upon the first Monday after the passage of the said act, or at any other time, and from doing any act under or in pursuance of the provisions of the said act, chapter 427 of the Laws of 1896; and that the defendants who are members of said common council, and each of them, and their successor or successors, be and they hereby are forever enjoined and restrained from declaring any person to have been elected as such police commissioner, who has not received the votes of a majority of the members of the said common council or of the members who are present and voting at any meeting thereof; and that the defendants, John Boyd Thacher and others, constituting the board of police commissioners of said city, be, and they hereby are,

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forever enjoined and restrained from delivering or surrendering possession or control of the police department, police force, or any of the property, station-houses and offices within the city of Albany, now in the possession of said defendants, constituting said board of police commissioners, to any person or persons who may claim to have been appointed police commissioners under the provisions of the said act, chapter 427 of the Laws of 1896.

Clerk of Albany county, enter.

Judgment signed and entered this 16th day of May, 1896.

ARTICLE II.

WHEN AND IN WHAT MANNER ACTIONS MAINTAINED BY AND AGAINST CERTAIN OFFICERS. §§ 1926-1931.

§ 1926. Actions by certain county, town, and municipal officers.

An action or special proceeding may be maintained, by the trustee or trustees of a school district ; the commissioner or commissioners of highways of a town ; the overseer or overseers of the poor of a town, village or city ; the supervisor of a town ; the county superintendent or superintendents of the poor ; or the supervisors of a county, upon a contract, lawfully made with those officers or their predecessors, in their official capacity ; to enforce a liability created, or a duty enjoined, by law, upon those officers, or the body represented by them ; to recover a penalty or a forfeiture, given to those officers, or the body represented by them ; or to recover damages for an injury to the property or rights of those officers, or the body represented by them ; although the cause of action accrued before the commencement of their term of office.

§ 1927. Actions against such officers.

An action or special proceeding may be maintained, against any of the officers specified in the last section, upon any cause of action, which accrues against them, or has accrued against their predecessors, or upon a contract made by their predecessors in their official capacity, and within the scope of their authority.

§ 1928. The last two sections qualified.

The last two sections do not apply to a case, where it is specially prescribed by law, that an action may be maintained, by or against the body, represented by an officer designated in those sections ; but, in such a case, the prosecution or defence of the action, as the case may be, must be conducted by the persons then in office, who represent that body.

§ 1929. Designation of such officers in the summons, etc.

In an action or special proceeding, brought pursuant to section 1926 or section 1927 of this act, the officer, by or against whom it is brought, must be described in the summons, or other process by which it is commenced, and in the subsequent proceedings therein, by his individual name, with the addition of his official title. An objection, growing out of an omission to join any officer, who ought to be joined with the others, must be taken by the answer, or, in a special proceeding, before the close of the case, on the part of the defendant ; otherwise it is waived.

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§ 1930. Successor may be substituted.

In such an action or special proceeding, the court must, in a proper case, substitute a successor in office, in place of a person made a party in his official capacity, who has died or ceased to hold office; but such a successor shall not be substituted as a defendant, without his consent, unless at least fourteen days' notice of the application for the substitution, has been personally served upon him.

§ 1931. When execution against officer not to issue.

An execution cannot be issued upon a judgment for a sum of money, rendered against an officer in an action or special proceeding brought by or against him, in his official capacity, pursuant to this article; except where it is rendered against the trustee or trustees of a school district, or the commissioner or commissioners of highways of a town. In either of those cases, an execution may be issued against and be collected out of the property of the officer, and the sum collected must be allowed to him, in the settlement of his official accounts, except as otherwise specially prescribed by law.

Supervisors of a town are authorized to sue to enforce any liability to the body which they represent. *Town of Lewis v. Marshall*, 56 N. Y. 663; *Town of Guilford v. Cooley*, 58 N. Y. 116; *Hathaway v. Town of Cincinnatus*, 62 N. Y. 434; *Hardenburgh v. Van Keuren*, 16 Hun, 17; *Gleason v. Youmans*, 13 Week. Dig. 25; *Griggs v. Griggs*, 56 N. Y. 504; *Town of Chautauqua v. Birdsall*, 3 Week. Dig. 123; *Sutherland v. Carr*, 85 N. Y. 105. See, however, for certain cases, where it was held supervisor cannot bring action, *Town of Duaneburgh v. Jenkins*, 46 Barb. 297; *Robbins v. Woolcott*, 66 Barb. 63; *Hagadoru v. Raux*, 72 N. Y. 583. It is not necessary for the continuance of the action that the successor of the original party should be substituted. *Griggs v. Griggs*, 56 N. Y. 504. An action against persons who, by their wrongful and fraudulent conduct, have created a debt which a town will be obliged to pay, is properly brought by a supervisor of the town in its behalf. *Mitchell v. Strough*, 35 Hun, 83. An action on behalf of a town to recover taxes improperly withheld from it is properly brought in the name of the supervisor. *Bridges v. Supervisors of Sullivan*, 92 N. Y. 570. Commissioners of highways cannot maintain an action to enjoin the construction of a permanent obstruction to a highway. *Coykendall v. Durkee*, 13 Hun, 260. A commissioner of highways can maintain an action against his predecessors in office to recover moneys received by the latter as commissioner and remaining unexpended in his hands at the expiration of his official term. *Victory v. Blood*, 25 Hun, 515. The supervisor and commissioner of highways cannot

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maintain a suit, in their joint names as such officers, on a contract made by them for the town. *Palmer v. Fort Plain, etc. Co.* 11 N. Y. 376. Road commissioners of different towns cannot unite in an action for an encroachment on a road dividing the two towns. *Bradley v. Blair*, 17 Barb. 480.

A county may sue to recover its moneys wrongfully paid out. *Supervisors of Richmond v. Ellis*, 59 N. Y. 620. An action against the sureties on the official bond of a county treasurer, charged with misapplying funds belonging to an infant, and realized from a sale of real estate, taking place under a judgment in partition, is properly brought in the name of the board of supervisors, and the recovery inures to the person for whose benefit it is prosecuted. *Supervisors of Tompkins v. Bristol*, 99 N. Y. 316. School districts being *quasi* corporations, contracts made by their trustees may be enforced against their successors. *Wait v. Ray*, 67 N. Y. 36. A judgment against the commissioners of highways of a town, not being a judgment against the town, the board of supervisors of the county cannot be compelled, by *mandamus*, to levy the amount of the judgment upon the town. *People ex rel. Everett v. Supervisors of Ulster*, 29 Hun, 185, affirmed, 93 N. Y. 397, citing *People ex rel. Van Keuren v. Auditors of Esopus*, 74 N. Y. 311.

The officers should sue in their own names as such officers, with their official title added. *Horton v. Parsons*, 37 Hun, 42; *Supervisor of Galway v. Stinson*, 4 Hill, 136; *Agent of State Prison v. Rikerman*, 1 Den. 274; *Paige v. Fazackerly*, 36 Barb. 392; *Gould v. Glass*, 19 Barb. 179; *Commissioners v. Peck*, 5 Hill, 215; *Trustees v. Acker*, 26 How. 263; *Victory v. Blood*, 25 Hun, 515. Where the complaint was entitled merely by the name and description of supervisor, but alleged that the plaintiff, "as supervisor," etc., and the defendant demurred, the demurrer was overruled. *Smith v. Levinus*, 8 N. Y. 472. So, where it was alleged, the "plaintiffs commissioners of highways complain," held, good. *Fowler v. Westervelt*, 40 Barb. 374. An allegation that plaintiff is supervisor, and as such he avers the money sued for belongs to the town, shows a suit in his official capacity. *Griggs v. Griggs*, 66 Barb. 287, affirmed, 56 N. Y. 504. But a mere addition, in the title, of the words descriptive of the office does not prevent the office from being a private and personal one. *Bonesteel v. Garlinghouse*, 60 Barb. 338. The complaint must

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contain averments showing that plaintiffs sue officially as well as describe them as such officer in the title. *Gould v. Glass*, 19 Barb. 179. An action against persons named, adding trustees of school district, *held* a personal action, there being no averment that the defendants were trustees, nor that the plaintiff claimed to recover against them as such, and an application to amend the complaint was denied. *Shuler v. Meyers*, 5 Lans. 170. A suit against the county should be against the board of supervisors, and not against the individual members of the board. *Wild v. Supervisors*, 9 How. 315; *Hill v. Supervisors*, 12 N. Y. 52. A public officer need not plead the facts showing his right to the office. *Kelly v. Breusing*, 33 Barb. 123.

Until substitution is made, the action may proceed in the names of the original parties. *Board of Excise v. Garlinghouse*, 45 N. Y. 249; *Manchester v. Herington*, 10 N. Y. 164; *Colegrove v. Breed*, 2 Den. 125. See *contra*, *Barker v. Norton*, 3 Hill, 474. Where, after an action has been brought by a supervisor of a town, under § 1926, his term of office expires, it is only in "a proper case" that the court will, upon the application of his successor, substitute him in place of the original plaintiff. Where it appears from the relation existing between the defendant and the new supervisor and the attitude of the latter to the subject-matter of the litigation, that the application is made in the interest of the defendant rather than of the town, it should be denied. The order of the Special Term directing such substitution to be made is reviewable upon appeal by the General Term. *Farnham v. Benedict*, 29 Hun, 44. In an action brought by or against a commissioner of highways as such, his opponent, if successful, is entitled to a personal judgment against him under § 1930, and therefore his successor in office cannot be substituted in his place as a party to such action, and that although the successor consents to be substituted. *Hitchman v. Baxter*, 5 Civ. Pro. R. 226.

The method by which a judgment against commissioners of highways may be enforced is prescribed by statute, and excludes the idea that it may be enforced against the town, as it is expressly authorized to be collected from the property of the individual commissioners, and in no other way. This section is substantially a re-enactment of the Revised Statutes. *People ex rel. Everett v. Supervisors of Ulster*, 93 N. Y. 403. (This was be-

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fore the act authorizing suit directly against the town.) The provision making a judgment against a town officer a town charge includes only actions against a town officer where an act complained of was done by him in his official capacity; it does not include a case where a judgment is obtained against him for damages resulting from a neglect on his part. *People ex rel. Loomis v. Auditors*, 75 N. Y. 316; *People ex rel. Van Keuren v. Auditors*, 74 N. Y. 310.

Actions to recover the penalties imposed for peeling bark or cutting timber are civil actions which should be brought by the county treasurer, and not by the supervisor of the town where the illegal act was committed. *Prentice v. Weston*, 47 Hun, 121. Where through the negligence of the agents of the State, certain highway bridges of the town were injured, it was held that the claim therefor on behalf of the town was properly presented in the name of its supervisor. *Bidelman v. State of New York*, 110 N. Y. 232. The supervisor of a town may maintain an action to recover moneys used by the county treasurer to pay county debts. *Wood v. Board of Supervisors of Monroe Co.* 50 Hun, 1. A party may recover upon a contract lawfully made with an overseer of the poor or his predecessor in office. *Christman v. Phillips*, 58 Hun, 282, 34 St. Rep. 444, 12 Supp. 338. Section 1926 does not create a new cause of action, but confers upon a trustee of a school district the right to maintain in his own name an action upon existing causes of action in favor of the body represented by him or for his predecessor, or on a contract made by him. *Chrington v. McGregor*, 74 Hun, 343.

A judgment recovered against the trustees of a school district upon a contract entered into by them on behalf of the district, binds them individually and may be collected by execution out of their individual property. Where the action is defended without any resolution of the district meeting, no obligation rests upon the district to indemnify the trustees for costs, charges and expenses until a district meeting shall have found in favor of the claim and voted that a tax be assessed and collected for its payment, or unless on appeal from the refusal of the meeting to vote a tax, it shall be decided that the account in whole or in part ought justly to be charged upon the district. *People v. Abbott*, 107 N. Y. 225. The provisions of § 182, chapter 569 of 1890, are within the application of § 1928 of the Code, to the effect that §§ 1926 and 1927

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do not apply to a case where it is specially prescribed by law that an action may be maintained by or against the body represented by an officer designated in those sections. Under this act, an action on a contract of a town overseer of the poor must be instituted against the town. *Miller v. Bush*, 87 Hun, 507, 68 St. Rep. 52, 34 Supp. 286. Neither the Revised Statutes nor the Code of Civil Procedure, § 1931, imposes an absolute liability upon towns for all judgments recovered against a sole commissioner of highways in actions prosecuted by him in his official name. *People v. Barnes*, 114 N. Y. 317, 23 St. Rep. 795. When a judgment has been entered against an officer in his official capacity, it may be collected of the town for which the plaintiff as overseer sues, where the action has been brought by him as overseer of the poor of the town. A defendant is not entitled to an order directing the county treasurer to pay to the defendant the amount of his costs out of money deposited in such case by informers. *Montgomery v. Odell*, 73 Hun, 424, 56 St. Rep. 625. The commissioners of charities and correction in New York city when suing must sue in their individual name and their official designation added. *Commissioners of Charities v. Darge*, 1 City Ct. 373.

A commissioner of highways cannot bind a town by an executory contract except under authority of the statute. He has no authority under chapter 560, Laws of 1892, to employ an attorney in instituting a proceeding to lay out a highway thereunder. *People ex rel. Bevens v. Supervisors of Warren*, 82 Hun, 298, 63 St. Rep. 577, 31 Supp. 248. A highway commissioner has no power to pledge the credit of a town for material to be used in the repair of roads and bridges, and a board of town auditors cannot be compelled to audit his accounts therefor. *People ex rel. Bowles v. Burrell*, 14 Misc. 217. Towns have very limited corporate capacity, and no general authority, to make contracts payment under which can be enforced against them, and persons dealing with town officers are charged with notice of their limitations, and in order to recover an indebtedness against the town must point out the statute that makes the town liable. *Morson v. Town of Gravesend*, 89 Hun, 52; s. c. 69 St. Rep. 450, 35 N. Y. Supp. 94.

CHAPTER XXXIII.

ACTIONS AND RIGHTS OF ACTION BY AND BETWEEN JOINT DEBTORS.

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ARTICLE I.

JUDGMENT AND EXECUTION AGAINST DEFENDANTS JOINTLY INDEBTED, WHEN ALL ARE NOT SERVED. §§ 1932-1936.

§ 1932. Judgment against defendants jointly indebted, when all are not served.

In an action, wherein the complaint demands judgment for a sum of money against two or more defendants, alleged to be jointly indebted upon contract, if

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the summons is served upon one or more, but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants, upon whom it is served, unless the court otherwise directs; and, if he recovers final judgment, it may be taken against all the defendants thus jointly indebted.

§ 1933. Effect of such judgment.

Such a judgment is conclusive evidence of the liability of each defendant, upon whom the summons was personally served, or who appeared in the action. Where it is taken against a defendant, upon whom the summons was served by publication, or without the state, pursuant to an order for that purpose, it has the effect as against that defendant, specified in section 445 of this act. As against such a defendant, who is allowed to defend after judgment, or as against a defendant not summoned, it is evidence only of the extent of the plaintiff's demand, after the liability of that defendant has been established, by other evidence.

§ 1934. Execution; indorsement thereupon.

An execution upon such a judgment must be issued, in form, against all the defendants; but the attorney for the judgment-creditor must indorse thereupon a direction to the sheriff, containing the name of each defendant, who was not summoned, and restricting the enforcement of the execution, as prescribed in the next section.

§ 1935. How collected.

An execution against the person, issued upon such a judgment, shall not be enforced against the person of a defendant, whose name is so indorsed thereupon. An execution against property, issued upon such a judgment, shall not be levied upon the sole property of such a defendant; but it may be collected out of personal property owned by him, jointly with the other defendants, who were summoned, or with any of them; and out of the real and personal property of the latter, or of any of them.

§ 1936. Judgment, how docketed; effect of docketing.

Where a judgment has been taken, as prescribed in section 1932 of this act, the clerk, with whom the judgment-roll is filed, must write upon the docket, opposite or under the name of each defendant, upon whom the summons was not served, the words, "not summoned;" and a like entry must be made by each county clerk, with whom the judgment is afterwards docketed. The judgment does not, by virtue of its being docketed, bind any real property, or chattel real, owned by such a defendant. But this section does not affect the plaintiff's right of action, to charge the judgment upon any real property.

There is no statutory authority allowing one joint debtor or partner to make an offer in behalf of his joint debtor or copartner. This section, allowing judgments to be entered in form against both joint debtors when only one is served does not relate to judgments entered upon offers. *Garrison v. Garrison*, 67 How. 271. A joint judgment against joint debtors cannot be entered on an offer, and the action is not capable of severance, so that

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a separate judgment can be taken against a defendant who makes the offer. *Bannerman v. Quackenbush*, 7 Civ. Pro. R. 428, affirmed, 9 Civ. Pro. R. 108. See *contra*, *Emery v. Emery*, 9 How. 130; *Pardee v. Haynes*, 10 Wend. 630; see, also, the provisions of § 1278.

If the defendant served establishes a personal defence, such as infancy, no judgment can be entered against those not served. *Leggett v. Boyd*, 6 Wend. 500. But where one defendant in an action upon a joint contract, where all are served, sets up an equitable defence peculiar to him, the court may give judgment for plaintiff against the other defendants and for one defendant against the plaintiff. *Barker v. Cocks*, 50 N. Y. 689. There may be a separate judgment against those found liable, and a nonsuit as to the others. *Fielden v. Lahens*, 6 Abb. (N. S.) 341; *Stimson v. Van Pelt*, 66 Barb. 151; *Clegg v. Cramer*, 32 Hun, 163; *Barth v. Amberg*, 9 St. Rep. 522.

Where the summons is served on only one of two joint debtors, judgment may be taken against both. *Stannard v. Mattice*, 7 How. 4; *Lahey v. Kingon*, 13 Abb. 192; *Northern Bank v. Wright*, 5 Robt. 604. It is irregular to enter it against only one. *Nelson v. Bostwick*, 5 Hill, 37; *Niles v. Battershall*, 18 Abb. 161. Where, in an action against three partners, summons was served on two, judgment entered against two by default, and execution issued against the joint property of all, and returned unsatisfied, it was held that an order was proper correcting the judgment *nunc pro tunc*, so as to make it against all. *Produce Bank v. Morton*, 67 N. Y. 199. In *Fudd v. Linseed Oil Co.* 76 N. Y. 543, it was held that where, in an action against partners upon a partnership obligation, judgments were entered against each of the defendants, instead of a joint judgment against all, this was an irregularity merely, and the judgment would not be set aside unless motion was made within the year. It is regular to take judgment against all defendants jointly liable as partners, although two have compromised their liability. *Saxton v. Dodge*, 46 How. 467.

Under the old Code, § 136, it was held that where one joint debtor has been personally served, and the other has been served by substituted service, plaintiff cannot enter judgment until the time to answer of the defendant, upon whom substituted service is made, has expired, and must then enter judgment against both. *Orr v. McEwen*, 16 Hun, 625.

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A creditor, seeking in a court of equity to maintain his right to enforce securities given to him, does not have his equitable rights cut off by taking a judgment by confession against one of the joint debtors. *Remington Paper Co. v. O'Dougherty*, 36 Hun, 79. Where the service was on one defendant only who made default, and judgment was entered in form against all, the court subsequently, upon the application of the one not served, permitted him to come in and defend. *Ford v. Whitbridge*, 9 Abb. 416. In an action against three persons as partners, one not being served with the summons or appearing, plaintiff is entitled to judgment against the other two, upon evidence that they alone constituted the partnership. *Pruyn v. Black*, 21 N. Y. 300. In such a case, to entitle plaintiff to a judgment against a defendant not served, it must be shown he was a partner. *Crandall v. Beach*, 7 How. 271. Where a number of defendants are sued upon a joint liability, and some defend while one fails to answer, judgment cannot be taken until the defence is disposed of. *Catlin v. Latson*, 4 Abb. 248. The courts will not allow the provisions of the Code, as to service upon joint debtors, to be made the means of obtaining a judgment against a firm through the collusion of a partner with the plaintiff. A judgment so entered will be promptly set aside. *Everson v. Gehrman*, 1 Abb. 167; *Griswold v. Griswold*, 14 How. 446; *Bridenbecker v. Mason*, 16 How. 203.

Upon the death of one of several defendants, in an action upon a joint liability, the suit should be continued against the surviving defendants. The death of one of several partners jointly liable does not abate the action, and it must be continued against the survivors alone, as it is not generally proper in an action at law to join the legal representatives of a deceased joint debtor as defendants with the surviving debtors. *Voorhis v. Childs' Executor*, 17 N. Y. 354; *Fine v. Richter*, 3 Abb. (N. S.) 385; *Richter v. Poppenhausen*, 42 N. Y. 373. See *Masten v. Blackwell*, 8 Hun, 313, and *Organ v. Wall*, 19 Hun, 184. A judgment rendered against all joint debtors upon service on one or more is not, as against those not served, even *prima facie* evidence of indebtedness, which must be rebutted. It has no effect upon him beyond allowing execution to be collected of the personal property, which he owns as partner with the other defendants, nor does it affect the extent of his liability further than that in the new action plaintiff may recover less, but cannot recover more than the judgment.

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Oakley v. Aspinwall, 4 N. Y. 514. A joint debtor can make the same defence in an action to charge him with the amount remaining unpaid on a judgment against his firm on service on his co-partners alone, that he could have made in the original action, if the summons had been served upon him therein. *Richardson v. Case*, 3 Civ. Pro. R. 295.

It seems where an action is brought against several defendants upon a joint obligation, the judgment should be against all proved to have been jointly liable whether they were all served with process or not, and the refusal of the court to direct such a verdict in a proper case would be an error requiring reversal of the judgment. *Sternberger v. Bernheimer*, 121 N. Y. 194, 30 St. Rep. 751. In an action against joint debtors service of summons on one authorizes judgment against all, which may be enforced by execution against the joint property although the other defendants are not served and do not appear in the action. *Yerkes v. McFadden*, 141 N. Y. 136, 56 St. Rep. 672, citing *Sternberger v. Bernheimer*, *supra*. Where the complaint alleged a joint liability on the part of the defendants, and the facts therein set forth not being denied by the answer, are found by the trial judge to be true, judgment may be had against all of the defendants under § 1932, although only a part of them were served, as § 265 of the Code does not apply. All that is necessary is that in docketing the judgment the requirements of § 1936 of the Code, and upon issue of execution the requirements of §§ 1934 and 1935 should be observed. *Priessenger v. Sharp*, 39 St. Rep. 260, 14 Supp. 372.

An omission to indorse on the execution against partners the name of the partner not served does not make the execution void, but it may be amended by an order of the court. *Crane v. Cranitch*, 52 St. Rep. 515. A judgment entered by default against one or more co-sureties or joint debtors in an action brought against all, is a bar to the further prosecution of the action against the others. The entry of such judgment however is not a bar on the right of action against one of those against whom it was entered where the default is subsequently vacated as to him and he is allowed to answer. *O'Hanlin v. Scott*, 89 Hun, 44, 35 Supp. 32, 69 St. Rep. 227.

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ARTICLE II.

PROCEEDINGS IN ACTION TO CHARGE DEFENDANTS NOT PERSONALLY SUMMONED. §§ 1937, 1938, 1939, 1940, 1941.

§ 1937. Action to charge defendants not personally summoned.

After the recovery of a judgment against joint debtors, as prescribed in section 1932 of this act, an action may be maintained by the judgment creditor, against one or more of the defendants, who were not summoned in the original action, to procure a judgment, charging his or their property with the sum remaining unpaid upon the original judgment.

§ 1938. Complaint in such action.

The complaint in such an action must be verified; must contain an allegation that the judgment has not been paid; and must state the sum, remaining unpaid thereupon, at the time of the verification.

§ 1939. Answer.

The defendant's answer is restricted to defences or counterclaims, which he might have made in the original action, if the summons therein had been served upon him, when it was first served upon a defendant jointly indebted with him; objections to the judgment; and defences or counterclaims, which have arisen since it was rendered.

§ 1940. Provisional remedies.

For the purpose of obtaining an order of arrest, an injunction order, or a warrant of attachment, the action is regarded as being founded upon the contract, upon which the original judgment was recovered.

§ 1941. Judgment.

Where the judgment is in favor of the plaintiff, it must determine the sum remaining unpaid upon the original judgment; and it may be docketed, and an execution may be issued thereupon, as if it was a judgment for the sum so remaining unpaid, and the costs, if any. Costs must be awarded, as if the action was brought upon the original contract, and the sum so remaining unpaid had been recovered therein.

Where pursuant to § 1932, a plaintiff has obtained judgment against joint debtors, one of whom has not been served with the summons, an action brought pursuant to this section against such defendant is not barred, so long as the judgment remains in force. *Long v. Stafford*, 3 St. Rep. 87; *Maples v. Macker*, 22 Hun, 228. A transfer of ownership of the judgment is no defence to a proceeding under this section. The assignee may be brought in by motion as plaintiff or he may continue the action in the name of the original plaintiff. *Merchants' Bank v. Waizfelder*, 14 Hun, 47. The remedy afforded by § 375 of the old Code, for

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which this is a substitute, was held to be cumulative and not to take away any other remedy; *Lane v. Salter*, 51 N. Y. 1. See, also, *Dean v. Eldridge*, 29 How. 218; *Prince v. Cujas*, 7 Robt. 76; and it was held not to apply to a judgment of a Justice's Court. *Ticknor v. Kennedy*, 4 Abb (N. S.) 417. The remedy applies to a case where there is a joint agreement of two to deliver up securities, and a wrongful conversion and judgment recovered. *Austin v. Randon*, 44 N. Y. 63. An action on a judgment against the defendants therein, entered in form against them jointly, is presumptively an action against joint debtors. *Stahl v. Stahl*, 2 Lans. 60. The remedy only exists where one of several persons jointly indebted upon contract has been named in the original summons and complaint, but has not been served. An additional defendant cannot be brought in under this section. *Freeman v. Barrowcliff*, 43 Super. Ct. 313. Where the same judgment is entered against two or more parties, they are, with reference to said judgment, joint debtors. *Barnes v. Smith*, 16 Abb. 420. Where plaintiff recovers judgment on contract against three out of four joint debtors, the action being against all four, but the summons served only on the three against whom the recovery was had, he may proceed against the defendant not served. *Harper v. Bangs*, 18 How. 457.

A summons in an action against two joint debtors was served upon one of them only, and after a verdict rendered against him the entry of judgment was stayed on appeal; the defendant died, and the court on notice made an order vacating the stay so as to permit plaintiff to enter a judgment *nunc pro tunc*, of the date of the verdict, which was done and a memorandum of defendant's death entered thereon. In a subsequent action to charge the defendant who had not been served with the judgment, *held*, that such entry of judgment was authorized, as the parties were both principal debtors; that the death of one of them did not discharge their joint liability and the separate liability of the estate of the deceased. In such case the judgment in the original action is evidence against the defendant sought to be charged, to the extent of plaintiff's demand, and all plaintiff is bound to do is to establish the joint liability of the defendant with the party originally served. *Long v. Stafford*, 103 N. Y. 274. Where one of two or more makers of a promissory note is an accommodation maker, the effect of the judgment on a note recovered against

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him alone is to sever the joint liability of the makers and to render him alone liable thereupon. Nor does his death relieve his liability. So held where the cause of action arose before the Code of Civil Procedure. *Smith v. Osborne*, 31 Hun, 390. An action may be brought under this section, after the recovery of a judgment against joint debtors, although the defendants served have appeared and given the security required by § 1310. *Morey v. Tracey*, 92 N. Y. 581.

On August 12, 1872, a judgment was recovered against Wall, as survivor of a firm composed of himself and Stevens, on a firm note; the complaint alleged the partnership, the death of Stevens, and that Wall was the sole surviving partner on this judgment; an execution was issued and partially collected. In 1878, on notice to Wall, the summons and complaint were amended by adding the names of other persons as survivors of the firm. Thereafter, a summons was issued requiring the additional defendants to show cause why they should not be bound by the judgment entered in 1872, as amended in 1878. Held, that the summons was irregular, and should be set aside. *Organ v. Wall*, 19 Hun, 185. Plaintiff's irregularities in practice do not affect the jurisdiction of the court, and are waived by failure of the joint debtors to take the objections at the proper time. *Decker v. Kitchen*, 26 Hun, 173. The remedy exists only where one of several persons jointly indebted on contract has been named in the original summons and complaint, and not served; an additional defendant cannot be brought in. *Freeman v. Barrowcliffie*, 44 Super. Ct. 313. Where the same judgment is entered against two or more parties, they are, with respect to such judgment, joint debtors. *Barnes v. Smith*, 16 Abb. 420. The provision applies to a case where there is a joint agreement of two to deliver up securities and a wrongful conversion and judgment recovered. *Austin v. Rawdon*, 44 N. Y. 63; s. c. 42 N. Y. 155. Where, pending a suit against three, one died, and judgment by default was entered against the others, and afterward the administrator of deceased was substituted as defendant, it was held that a new action should have been brought, based on the original debt, the death of one debtor, the appointment of his representative, and insolvency of the survivors. *Masten v. Blackwell*, 8 Hun, 313. An action on a judgment against the defendants therein, entered in form against them jointly, is presumptively an action against joint debtors. *Stahl*

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v. *Stahl*, 2 Lans. 60. Where plaintiff recovers judgment on contract against three out of four joint debtors, the action being against all four, but the summons served only on the three against whom the recovery was had, he may proceed against the defendant not served. *Harper v. Bangs*, 18 How. 457.

The provision of the Code reserving to a defendant not originally served, but sought to be charged with the judgment, the right to make objections to the judgment, refers simply to the objections going to the validity and binding efficacy of the judgment, such as a party to the judgment might take. *Long v. Stafford*, 103 N. Y. 274. Although in *Richardson v. Case*, 3 Civ. Pro. R. 295, it was held that a joint debtor has the same defences as he would have had if served in the original action, and the judgment is not conclusive evidence of the amount of the debt. This rule was also held in *Maples v. Mackey*, 89 N. Y. 146, to which the reporter appends a foot-note as follows: "By the provisions of the Code of Civil Procedure, which is the substitute for § 375 of the old Code, the proceedings to charge a defendant not originally served is made an action. The defendant's answer, however, is expressly restricted (§ 1939) to such defences as might have been made to the original action had summons been served on the debtor so sought to be charged, when it was served upon his joint debtors, to objections to the judgment, and to defences or counterclaims which have arisen since." This case is cited in *Long v. Stafford*, 103 N. Y. 274, *supra*, as authority for the provision that, if the original judgment is not barred, the cause of action is not barred. A demurrer was held not to be permissible. *Freeman v. Barrowcliffe*, 44 Super. Ct. 313. A debtor not originally served cannot set up that the statute of limitations has run since the judgment. *Broadway Bank v. Luff*, 51 How. 479; *Gibson v. Vanderzee*, 47 How. 231. Nor where it had run before service on parties originally served. *Berlin v. Hall*, 48 Barb. 442. This is a special statutory proceeding, and defendant is entitled to twenty days' notice, although the suit is in the Marine Court. *Kernochan v. Bland*, 59 How. 97. In an action against joint debtors, partners, summons was served on only one, and judgment entered against him. *Held*, such judgment was unauthorized, but it was an irregularity merely and not void. *Decker v. Kitchen*, 26 Hun, 173.

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ARTICLE III.

COMPOSITION BY ONE OF JOINT DEBTORS. §§ 1942, 1943, 1944.

§ 1942. Joint debtors may compound separately. Mode and effect.

A joint debtor may make a separate composition with his creditor, as prescribed in this section. Such a composition discharges the debtor making it; and him only. The creditor must execute to the compounding debtor a release of the indebtedness, or other instrument exonerating him therefrom. A member of a partnership cannot thus compound for a partnership debt, until the partnership has been dissolved by mutual consent or otherwise. In that case the instrument must release or exonerate him, from all liability, incurred by reason of his connection with the partnership. An instrument, specified in this section, does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter; unless an intent to release or exonerate him, appears affirmatively upon the face thereof.

§ 1943. Satisfying judgment.

An instrument, specified in the last section, is deemed a satisfaction-piece, for the purpose of discharging, as prescribed in section 1260 of this act, the docket of a judgment, recovered upon an indebtedness released or discharged thereby, as far as the judgment affects the compounding debtor. Where the docket of a judgment is discharged thereupon, a special entry must be made upon the docket, to the effect, that the judgment is satisfied, as to the compounding debtor only.

§ 1944. Rights of the debtors not released.

Where a joint debtor has thus compounded, a joint debtor, who has not compounded, may make any defence or counterclaim, or have any other relief, as against the creditor, to which he would have been entitled, if the composition had not been made. He may require the compounding debtor to contribute his ratable proportion of the joint debt, or of the partnership debts, as the case may be, as if the latter had not been discharged.

The obligation of one of two co-sureties is to pay the whole debt. If he does so, he may recover of his co-surety one-half. If he pays less than the whole debt, he can recover from his co-surety the amount he has paid in excess of the moiety. Where a co-surety has, by the conduct of the creditor, been released from liability, another co-surety will be held to be exonerated only as to so much of the original debt as the one so discharged could have been compelled to pay. A release by parol of one joint debtor will not operate as a discharge to the others, and can only be pleaded by the one to whom it is given. There is a distinction between the rule in England and in this country. *Morgan v. Smith*, 70 N. Y. 537.

It was held under the Revised Statutes that a release of one joint debtor would discharge all, unless it referred to the statute.

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Hoffman v. Dunlap, 1 Barb. 185; *Cornell v. Masten*, 35 Barb. 157. *Contra*, as to agreement not under seal, *Irvine v. Milbank*, 15 Abb (N. S.) 378; *Honegger v. Wellstein*, 47 Super. Ct. 175. A compromise with one of several joint debtors was valid, although made out of the State. *Saxton v. Dodge*, 46 How. 467. A judgment against several for negligence is a joint obligation as to relatives of one of several joint debtors. *Irvine v. Milbank*, 14 Abb. (N. S.) 408, affirmed, 15 Abb. (N. S.) 378. So is the statutory joint and several liability of stockholders. *Herries v. Platt*, 21 Hun, 132. In the case where one of the joint obligors dies his representatives are discharged at law if he is a mere surety, and the survivor alone can be sued; but where the joint obligors were all principal debtors or received some benefit from the joint obligation, courts of equity will enforce the obligation against the representatives of a deceased obligor upon the ground that it is morally and equitably just that the estate should be made to respond. *Richardson v. Draper*, 87 N. Y. 337. Satisfaction by one joint tortfeasor is a bar to an action against another; so a partial satisfaction by one is proper to be shown by another in mitigation of damages. *Knapp v. Roche*, 94 N. Y. 329.

A release to one of several persons engaged in a joint adventure, of his individual liability, executed after their association had dissolved, *held*, not to discharge a co-debtor under the provisions of this section. *Marx v. Jones*, 36 Hun, 290. In an action for libel, where plaintiff recovered a verdict against two defendants jointly liable for different amounts, the one against whom the larger recovery was had having satisfied the judgment against him, *held*, such satisfaction operated to release the other debtor, except so far as the sheriff might be entitled to fees by reason of an actual levy on the property of the latter. *Breslin v. Peck*, 38 Hun, 623. See, also, *Lord v. Tiffany*, 98 N. Y. 412; *Conde v. Hall*, 92 Hun, 337. A release of one of several who are jointly and severally liable on contract or jointly liable for a tort, may be so framed as to reserve the liability of the others so far as is necessary to preserve to the releasor his right to full satisfaction. *Hood v. Hayward*, 26 Abb N. C. 271, 35 St. Rep. 229, 20 Civ. Pro. R. 47, 124 N. Y. 1.

It is not necessary that a release, to be effectual, shall follow the precise language of the statute. The composition is effectual although the instrument omits to state that the compounding

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debtor is thereby released from all liability where it appears by it that it was executed pursuant to said provision and it is shown that there was no other partnership debt owing to the creditor. *Harbeck v. Pupin*, 123 N. Y. 115, 33 St. Rep. 220. Where a release of one of two joint debtors contains an express provision that it shall not affect or impair claim of the creditor against the other debtor, the latter is not discharged. *Whitmore v. The Fudd Linsced and Sperm Oil Co.* 124 N. Y. 565.

Section 1942 authorizes the release of some defendants without releasing the others, and the fact that the action sounds in tort does not make the debt any the less a debt of a specific liquidated amount, so that the creditor might settle with one joint debtor, though this would not be the case where the debt or liability was unliquidated; that if one of the parties should be forced to pay more than his just proportion he could compel contribution of the co-debtors under § 1944. *Commercial National Bank v. Taylor*, 64 Hun, 499; s. c. 46 St. Rep. 417. Where the instrument relied on did not by its terms exonerate the defendant from an indebtedness for which action was brought under the statute, such effect could not be given to it by evidence *aliunde*. *Abbott v. Royce*, 20 St. Rep. 694. A release of a judgment recovered against one of two joint and several debtors without service of the other, necessarily releases the other, although it would be otherwise if a release of the liability of the one served. *Coonley v. Wood*, 36 Hun, 559. In 23 Abb. N. C., at page 194, will be found a note on release of one of several debtors, followed by precedents for releases in such cases.

A judgment against some one of several joint contractors discharges the rest and is pleadable by them in bar of an action on the original promise. *Sinclair v. Hollister*, 16 Supp. 529, 41 St. Rep. 349. In an action against two jointly sued, recovery may be had against one if his individual liability be made out. *Owen v. Conner*, 33 St. Rep. 144, 11 Supp. 352, citing *Brunskell v. James*, 11 N. Y. 294. Where in an action on a joint liability for goods sold, the proof showed only the admission of liability by one defendant, he disputing the amount due, it was held that a nonsuit was proper. *Martin v. Crehan*, 15 Supp. 449, 39 St. Rep. 652, distinguishing *Brunskell v. James*, 11 N. Y. 294. Release of one of two parties jointly liable for negligence, operates to discharge the other notwithstanding proof of a rescis-

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sion of the release not followed by a return of note taken upon the settlement. *Newman v. Stuckey*, 10 Supp. 760, 32 St. Rep. 876.

Where one of two joint debtors removed from and continues to reside out of the State, the running of the statute of limitations against the claim is suspended as to him, but not as to the debtor who remains within the State. *Brewster v. Bates*, 81 Hun, 294, 30 Supp. 780. In an action against one of several joint contractors to recover for services, if defendant fails to take advantage by demurrer or answer of the non-joinder of his co-contractor, a recovery may be had. *Douglas v. Leonard*, 17 Supp. 591, reversing 14 Supp. 274.

While a judgment may be entered against two or more persons upon service of a summons where they become jointly liable on contract, such a judgment cannot be entered in an action to restrain an infringement of a trade-mark. The court has no power in such an action to try any question against the person not served and appearing, or to find that he is a partner with the person served. *Seigert v. Abbott*, 42 St. Rep. 788.

ARTICLE IV.

ACTION AGAINST PERSONS ENGAGED IN TRANSPORTATION.

§ 1945.

§ 1945. Action against persons engaged in transportation.

In an action brought against one or more persons, engaged as a joint-stock association, partnership, or otherwise, in the periodical transportation of passengers or property, an objection to any of the proceedings cannot be taken, by a person properly made a defendant, on the ground that the plaintiff had joined with him, as a defendant, a person not jointly engaged with him in that business, or on the ground that the plaintiff has failed so to join with a person so jointly engaged; unless the persons so engaged have, at least thirty days before the commencement of the action, filed in the clerk's office of each county, in which they transport passengers or property, a statement showing the names of all of them. A statement so filed, is conclusive, for the purposes specified in this section, as against the persons filing it, until thirty days after filing, in like manner, a new statement, showing a change of interest.

ARTICLE V.

ACTIONS AGAINST AND BETWEEN PARTNERS. §§ 1946, 1947.

§ 1946. When partner not sued remains liable.

Where, for any cause, one or more partners have not been joined as defendants in an action upon a partnership liability, and final judgment has been taken

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against the persons made defendants therein, the plaintiff, if the judgment remains unsatisfied, may maintain a separate action upon the same demand, against each omitted partner, setting forth in the complaint the facts specified in this section, as well as the facts constituting his cause of action upon the demand.

§ 1947. Continuance of partnership business during action for accounting, etc.

In an action brought to dissolve a partnership, or for an accounting between partners, or affecting the continued prosecution of the business, the court may, in its discretion, by order, authorize the partnership business to be continued, during the pendency of the action by one or more of the partners, upon their executing and filing with the clerk an undertaking, in such a sum and with such sureties as the order prescribes, to the effect that they will obey all orders of the court, in the action, and perform all things which the judgment therein requires them to perform. The court may impose such other conditions as it deems proper, and it may, in its discretion, at any time thereafter require a new undertaking to be given. The court may also ascertain the value of the partnership property, and of the interest of the respective partners by a reference or otherwise, and may direct an accounting between any of the partners; and the judgment may make such provision for the payment to the retiring partners, for their interest, and with respect to the rights of creditors, the title to the partnership property, and otherwise, as justice requires, with or without the appointment of a receiver, or a sale of the partnership property.

The common-law rule that, in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants, is no longer the rule of procedure in this State. *Stedeker v. Barnard*, 102 N. Y. 327. Where the holder of a joint promissory note, prior to the Code of Civil Procedure, took judgment by confession, for the whole amount, against one of the makers, *held*, that the liability of the other makers was discharged by the judgment, the note as to all having been merged therein. *Candee v. Smith*, 93 N. Y. 349.

Section 1947 is stated by Mr. Throop to have been added during the progress of the Code through the legislature. This scarcely serves to explain the incongruity of a single section relating to actions between partners, which does not seem at all appropriate here, and which is entirely inadequate to give the practice in those cases, the more especially as it gives no new remedy. It was held before the enactment, that in an action for the dissolution of a copartnership, it was also a matter of course to grant an injunction and appoint a receiver. *McEncroe v. Decker*, 58 How. 250. And in *McElvy v. Lewis*, 76 N. Y. 373, it was held, that where, in a copartnership agreement, no time

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is named for its continuance and no provision made for the settlement of its concerns upon dissolution, it is dissoluble at the will of either of the partners. An action is maintainable for that purpose and the appointment of a receiver therein is proper.

Under § 1947 it was held in *Alford v. Berkele*, 29 Hun, 633, that in an action brought by one partner against his copartners to procure a dissolution of the copartnership, the court may, upon the application of the plaintiff, and the appearance of the resident partners, appoint a receiver of the firm assets without notice to one of the defendant partners, who is a non-resident. In an action to close up the affairs of a partnership, brought by the survivor where the judgment directs the sale of personal property at a place where the presence of the property is impracticable, the judgment is conclusive upon the parties, and as to them the fact that the property was not present does not affect the validity of the sale. *Winter v. Eckert*, 93 N. Y. 367. A dissolution is the most far-reaching remedy between partners, and a court of equity will not force partners into a dissolution, if justice can be done without resorting to this extreme measure. *Berolzheimer v. Strauss*, 51 Super. Ct. 96. In an action for a copartnership accounting, it is necessary to first ascertain whether a copartnership existed, if so, how the firm stands as to general creditors as to assets, then what each partner is entitled to charge against the other, and lastly, to apportion between them the profits to be divided or losses to be made good, and ascertain what, if any thing, any partner should pay to another, in order that all cross-claims may be settled. *McCall v. Moschcowitz*, 10 Civ. Pro. R. 107. An action for a partnership accounting, where the articles are under seal, is not barred until twenty years. *Dwinelle v. Edy*, 66 How. 328. A partnership formed for a particular purpose must continue till that purpose is effected unless some recognized cause exists for dissolution. *Hubbell v. Buhler*, 43 Hun, 82

CHAPTER XXXIV.

ACTION AGAINST USURPER OF AN OFFICE OR FRANCHISE.*

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ARTICLE I.

WHEN AND HOW ACTION MAINTAINED. §§ 1948, 1949, 1954.

§ 1948. Attorney-general may maintain action.

The attorney-general may maintain an action, upon his own information, or upon the complaint of a private person, in either of the following cases:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the state, a franchise or a public office, civil or military, or an office in a domestic corporation.
2. Against a public officer, civil or military, who has done or suffered an act, which by law works a forfeiture of his office.
3. Against one or more persons who act as a corporation, within the state, without being duly incorporated; or exercises within the state, any corporate rights, privileges or franchises, not granted to them by the law of the state.
4. [Added, 1896.] Against a foreign corporation which exercises within the state any corporate rights, privileges or franchises, not granted to it by the law of this state; or which within the state, has violated any provision of law, or, contrary to law, has done or omitted any act, or has exercised a privilege or franchise, not conferred upon it by the law of this state, where, in a similar case,

* This subject, under name of Quo Warranto, is treated in High on Extraordinary Legal Remedies, Shortt's Treatise on Information, Spelling on Extraordinary Relief, Wood on Mandamus, Quo Warranto, etc.

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a domestic corporation would, in accordance with section seventeen hundred and ninety-eight of this act, be liable to an action to vacate its charter and to annul its existence; or which exercises within the state any corporate rights, privileges or franchises in a manner contrary to the public policy of the state.

§ 1949. Proceedings when complaint names rightful incumbent.

In an action, brought as prescribed in the last section, for usurping, intruding into, unlawfully holding, or exercising an office, the attorney-general, besides stating the cause of action in the complaint, may, in his discretion, set forth therein the name of the person rightfully entitled to the office, and the facts showing his right thereto; and thereupon, and upon proof, by affidavit, that the defendant, by means of his usurpation or intrusion, has received any fees or emoluments belonging to the office, an order to arrest the defendant may be granted by the court, or a judge. The provisions of title first of chapter seventh of this act apply to such an order, and the proceedings thereupon and subsequent thereto, except where special provision is otherwise made in this title. For that purpose, the order is deemed to have been made as prescribed in section 549 of this act. Judgment may be rendered upon the right of the defendant, and of the party so alleged to be entitled; or only upon the right of the defendant, as justice requires.

§ 1954. One action against several persons.

Where two or more persons claim to be entitled to the same office or franchise, the attorney-general may bring the action against all, to determine their respective rights thereto.

This proceeding was formerly by writ of *quo warranto*, which was abolished by Code of Procedure, § 428. See § 1983. But it was only changed in form; the jurisdiction and power of courts was not affected. *People ex rel. Hatzel v. Hall*, 80 N. Y. 117. The remedy as given by the Code is a civil action, and the parties stand in the same relation as in civil actions. *People v. Cook*, 8 N. Y. 71; *People v. Clute*, 52 N. Y. 576. And the action is governed by all the rules which regulated the proceedings under the former practice. The proceeding, both now and formerly, was and is intended to try the right of the defendant to the office possessed by him. The right of an adverse claimant may also be tried in the same proceeding. The writ of *quo warranto* was in the nature of a writ of right for the king against him, who claimed or usurped any office, franchise or liberty, to inquire by what authority he supported his claim, in order to determine the right. Blackst. Com. 262. It furnishes the only remedy for trying the title to an office; *Morris v. Whelan*, 64 How. 109; *Palmer v. Foley*, 45 How. 110; *Hudson River, W. S. R. R. Co. v. Hay*, 14 Abb. (N. S.) 191; or to test the legality of a corporation formed under the General Village act. *People v. Clark*, 70 N. Y. 518.

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An office is not the property of an individual, but of the people. They have an interest in the exercise of its functions, and no court should, without giving them an opportunity to be heard, undertake to decide what individual should possess its emoluments and discharge its duties. The action must be brought in the name of the people, and the people are necessary parties where the title is to be tried indirectly. *Morris v. Whelan*, 64 How. 109, *supra*. The remedies given by statute for testing by direct action for that purpose, or by summary inquiry for that purpose, the title of officers of a corporation are exclusive. *Hudson R. R. Co. v. Hay*, 14 Abb. (N. S.) 191. The remedy for an intrusion into and usurpation of a public or corporate office, was on the information, in the nature of a *quo warranto*, filed by and in the name of the attorney-general upon his own relation, or upon the relation of a private party; the remedy is substantially the same under the Code, except that it is an action instead of an information, and is still brought by the attorney-general. *Parish of Bellfort v. Tooker*, 29 Barb. 256. The object of the provision of the Code was to provide a speedy and effective mode of determining the claims of persons to exercise the duties of an office within this State, and that involves the determination of the existence of a particular office. *People v. Carpenter*, 24 N. Y. 86.

The action lies against persons who intrude into the office of directors of a corporation, or an office created for the government of a corporation, or against persons who usurp the right to be a corporation. *People v. Tibbitts*, 4 Cow. 358. It may be brought against persons who hold over their term of office as trustees of a village, by reason of their own neglect to give notice of an election, by means of which new trustees were to be chosen; *People v. Bartlett*, 6 Wend. 422; against an individual intruding into the office of sheriff in consequence of an unlawful decision of a board of county canvassers in his favor; *People v. Van Slyck*, 4 Cow. 297; against one who, unauthorized, has usurped the office of alderman of a municipal corporation; *Lewis v. Oliver*, 4 Abb. 121; to try the title to a military office; *People v. Sampson*, 25 Barb. 254; against one claiming to exercise the office of supervisor. *People v. Carpenter*, 24 N. Y. 86. It is the proper remedy to oust a county judge alleged to have obtained his office by a promise to serve for less than the legal salary. *People v. Thornton*, 25 Hun. 456. *Quo warranto* will lie where the party pro-

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ceeded against is a *de facto* or *de jure* officer in possession of the office, and the facts are disputed. *People v. Common Council*, 77 N. Y. 503. A civil action cannot be maintained in the name of the people of the State for the redress of private wrongs; these are determinable at the suit of the persons interested only; the people cannot intervene except upon the assertion of a distinct right on the part of the public in respect to the subject-matter litigated. *People v. A. & S. R. R. Co.* 57 N. Y. 161. An action does not lie against the secretary and treasurer of a railroad company holding his office as a mere servant thereof and at the will of the directors. *People v. Hill*, 1 Lans. 102. It will not lie where an alderman was elected to Congress and it was claimed his office was thereby vacated under the city charter. *People v. Common Council*, 77 N. Y. 503.

Where, under a city charter, the board of supervisors is made judge of qualifications of its own officers, see *McVany v. The Mayor*, 80 N. Y. 185; and *People v. Hull*, 80 N. Y. 117, as to right to bring *quo warranto*. A claimant to a municipal office cannot maintain an action in his own name when it does not appear that any person claims the office in hostility to him, or that there has been any interference by defendant with his rights. *Demarest v. Wickham*, 63 N. Y. 320. The action will not lie on the relation of a person claiming title to the office of trustee of a school district when the question has been decided adversely to relator by the superintendent of public instruction. *People v. Collins*, 34 How. 336. Where the people, through their constitutional agent, ratify and recognize the title of a citizen to an office, it is not competent for them to question it by *quo warranto*, and the Legislature may ratify a title. *People v. Flannigan*, 66 N. Y. 237. Nor does the action lie before commencement of the term of office. The court can only give judgment of ouster, and this can only be done when an existing usurpation can be shown. *People ex rel. v. McCullough*, 11 Abb. (N. S.) 129. The title to a public office cannot be individually tried in an action for an injunction; it can only be determined by *quo warranto*. *Lewis v. Oliver*, 4 Abb. 121; *Mayor v. Conover*, 5 Abb. 171; *Palmer v. Foley*, 45 How. 110. The question of title to office cannot be indirectly tried on a *certiorari* directed to the officer; *People v. Walter*, 68 N. Y. 403; nor in a suit calling on the contesting claimants to interplead as to their right to the salary. *Buffalo v. Mackey*, 15

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Hun, 204. The validity of an appointment to office cannot be determined on an application to enforce the delivering of the books and papers belonging to the office. *People v. Allen*, 51 How. 97. The title of rival claimants to the office of trustee of a religious corporation cannot be determined in an equitable action brought by one claimant or set of claimants against another claimant or set of claimants; the remedy is by an action brought by the attorney-general in the name of the people. *Reis v. Rhode*, 6 Civ. Pro. R. 406, citing *Hartt v. Harvey*, 32 Barb. 55, and *North Baptist Church v. Parker*, 36 Barb. 171. The remedy for intrusion into an office is *quo warranto*. *People v. Ferris*, 16 Hun, 219. An action to declare an office forfeited proceeds upon the theory that the defendant being lawfully in office, by omitting to subscribe, take and file his oath of office as the law directs, forfeited his lawful right to continue the office. *People v. Platt*, 46 Hun, 394.

A court of equity has no inherent power to try the disputed title to corporate office and to enjoin one in possession from the exercise of its functions at the suit of a lawful claimant, but where the particular case presents other features calling for relief which are of equitable cognizance, and the trial of a disputed title to corporate office is only incidental thereto, the court may inquire into the legality thereof and grant relief, but its judgment cannot go to the extent of ousting a *de facto* officer, nor will it be permitted to have that effect. *Ciancimino v. Man*, 48 St. Rep. 697, 1 Misc. 121.

Where an incorporated company by its delay in commencing business forfeited its charter and its corporate power ceased, an action to restrain it from laying its pipes in the streets of a city can be maintained, as an action to restrain it from exercising corporate rights not granted by law. *People v. The Equity Gas Works Construction Co.* 52 St. Rep. 317. It was held, however, s. c. 141 N. Y. 232, that the attorney-general could not maintain an action in the name of the people against a corporation either under this section or at common law to restrain the commission of a nuisance in the city street by a corporation where local officials have authority to protect the street. The jurisdiction of a court of equity to abate an existing and prevent a threatened nuisance upon application of the attorney-general is limited to those public nuisances which affect and endanger the public safety or

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convenience, and require immediate judicial interposition, and where the relief sought may not with equal facility be obtained by their constituted authorities and public officers, and it was held that such an action was not maintainable against a gas light company to restrain the laying of gas pipes, on the ground that the corporate power of the company had ceased because of its failure to commence business within the period prescribed by law, and that the work would be an injury to the highway and a nuisance.

The right of a public office in possession of a person claiming under color of an election cannot be contested by the attempt of another person claiming title to exercise its functions. The title to an office can only be tried by a direct action brought for that purpose. A public corporation may maintain an injunction against a person claiming to be lawfully an officer of such corporation from assuming to act as such where the office is in the actual possession of another. *Seneca Nation of Indians v. John*, 27 Abb. N. C. 253, 16 Supp. 40. It was settled at a very early period in this State that when a person is already an officer by color of right, a court will not grant a mandamus to admit another person who claims to have been duly elected, but that the proper remedy is by an action *quo warranto*. *People ex rel. Nichol v. The New York Infant Asylum*, 122 N. Y. 190, 33 St. Rep. 296, citing *People v. Stevens*, 5 Hill, 616; *Morris v. People*, 3 Den. 381. Where the title to an office is involved, equity will not restrain the incumbent from exercising the duties of such office. *Breslin v. Quinn*, 2 Supp. 577. It is the policy of the law to allow the attorney-general to locate the place of trial of this class of cases in any county of the State, subject to the power of the court to change the place of trial for the convenience of witnesses, wherever the cause is in a proper condition for such a motion. *People v. Platt*, 10 St. Rep. 577, affirmed, 12 St. Rep. 409. The defendant cannot have the place of trial changed on account of residence. S. C. 10 St. Rep. 717.

The duty prescribed by § 1948 is an official one pertaining to the office of attorney-general and not to the person who at any time happens to be the incumbent of the office. It is a duty which goes with the office and devolves in turn upon each incumbent, and it is contrary to the theory of the action and the spirit of such statute that each successive attorney-general should be required to be substituted by an order of the court before he can

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proceed in such action. *People ex rel. Lardner v. Carson*, 78 Hun, 544; S. C. 29 Supp. 619. It is not necessary for the attorney-general to obtain the leave of the court to bring an action under this section. *People v. B. H. T. & W. R. R. Co.* 27 Hun, 528. The State has the right to remove one who has unlawfully intruded into a public office. The right to decide whether it will do so lies with the attorney-general, and his discretion cannot be reviewed by the courts. *People ex rel. v. Fairchild*, 8 Hun, 334. No positive duty is imposed upon the attorney-general to bring an action at the request of a party claiming an office from which he is expelled, but it is a matter within his discretion. S. C. on appeal, 67 N. Y. 334, applied in *People v. Crosstown R. R. Co.* 21 Hun, 476. The attorney-general, in an action brought in the name of, and on behalf of the people, represents the whole people and a public interest, and not mere individuals or a private right. *People v. Brooklyn, etc. Co.* 89 N. Y. 76. In *Attorney-General v. Continental Life Ins. Co.* 88 N. Y. 571, it was held that the attorney-general had no power to employ counsel to represent him in the conduct of suits or proceedings in which the State was interested, and this was followed in *People v. Metropolitan, etc. Co.* 11 Abb. N. C. 304, and the same rule held in *People ex rel. Gould v. Mutual Union Tel. Co.* 2 McCarty's Civ. Pro. R. 295; but in *Matter of Attorney-General v. North American Life Ins. Co.* 91 N. Y. 57, this holding was explained as being only a determination that the attorney-general could not, except in the cases pointed out by statute, employ counsel to appear for the people, so as to make their compensation a charge against the treasury, but not a decision that the attorney-general cannot depute special counsel to appear in his behalf, they making no claim upon the State for compensation; nor that their right to so appear was open to more question than if they represented a private individual. The attorney-general has no right under this provision to prosecute an action in the name of the people against commissioners appointed under an act of the legislature to prevent them from issuing town bonds, nor has he such power at common law. *People v. Miner*, 2 Lans. 396.

The action must be brought in the name of the people. § 1984. In an action in the nature of a *quo warranto* brought by the attorney-general on the relation of a person claiming the office against a party who has usurped it, the claimant is interested in the ques-

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tion, and should be a party. *People ex rel. Crane v. Ryder*, 12 N. Y. 433. The claimant is a proper if not a necessary party plaintiff in such a case; and the statement in the complaint, "The people complaining on the relation of," is a sufficient allegation that the action is brought on the relation of such party. *People ex rel. v. De Bevoise*, 27 Hun, 596.

An action may be brought by the attorney-general against several persons consisting of the different classes, each claiming, by virtue of separate elections, to be the directors of a corporation, for the purpose of trying their respective rights to such office, whether either of such elections was regular or legal, and if so, which one. *People v. A. & S. R. R. Co.* 55 Barb. 344. When proceedings are brought against an incorporated company, seeking to deprive it of its franchise on the ground of forfeiture by non-user, the action may be brought against the company in its corporate name. *People v. President, etc. of Bank of Hudson*, 6 Cow. 217. An omission to join the relator as a party may be cured by amendment, without costs. *People v. Walker*, 23 Barb. 304; *Morris v. Whelan*, 64 How. 109; *City of Brooklyn v. Mackey*, 15 Hun, 204; *People v. Ferris*, 16 Hun, 219.

ARTICLE II.

PROCEEDINGS IN THE ACTION. §§ 1950, 1955.

SUB. 1. PLEADINGS.

2. INJUNCTION. § 1955.
3. TRIAL BY JURY. § 1950.
4. EVIDENCE.
5. COSTS AND APPEAL.

SUB. 1. PLEADINGS.

A complaint which alleges that the relator was, by the greatest number of votes, elected to the office, need not contain a statement of the specific facts tending to prove such allegation, but a bill of particulars may be ordered. It need not be averred that the relator possessed the requisite qualifications, nor that he has taken the oath, or given a bond, nor need the number of votes be stated, if it is alleged that the relator received a plurality. *People ex rel. v. Nolan*, 10 Abb. N. C. 471. An election is alleged to have been legally held, pursuant to statute, for an officer to hold office for

ART. 2. Proceedings in the Action.

a term stated, to commence on a day stated; the time when the election was held is averred with sufficient definiteness to be good on demurrer. *People v. Ryder*, 12 N. Y. 433. See as to proper averment where action is brought by three relators as to specific office claimed by each. *People v. Murray*, 8 Hun, 577, reversed on another point, 70 N. Y. 521. The people need not allege the defendant's election and inability to hold an office, but simply that he has intruded into office unlawfully, and call upon him to show cause by what authority it is held. *People v. Knox*, 38 Hun, 236. In an action brought by the attorney-general, it was alleged that defendant had intruded into an office that he was not qualified to fill, by reason of non-residence, and that he had omitted to take the oath of office required by law, and judgment was demanded that he be adjudged guilty of usurping and intruding into the office and unlawfully holding and exercising its powers and franchises, and that he be ousted and excluded from the office, and pay a fine to the State. *Held*, that the relief claimed was generally consistent with the facts stated, and that the court had power to conform the judgment to the facts alleged. *People v. Platt*, 10 St. Rep. 577. It is not necessary to set forth in the complaint the grounds of defect in defendant's claim to office; it is enough to aver that he unlawfully exercises the office, and to call upon him to set up and show his title, if he has any. Every man who exercises an office must be ready to show his authority wherever the people, in the appropriate manner, demand to know it. *People v. Platt*, 10 St. Rep. 717. It is no answer to an information in the nature of a *quo warranto* that the aggrieved parties have their remedy by private action. *People v. Hillsdale, etc. Co.* 23 Wend. 254. It is a sufficient answer in a *quo warranto* against a corporation for usurping certain franchises to say that such franchises were granted by act of the Legislature. *People v. Rensselaer, etc. R. R. Co.* 15 Wend. 113.

Notice of Application and Petition to Attorney-General.

TO MESSRS. JOHN P. MICKLE, ISAAC E. BAIN, CHARLES E. HALSTEAD, WM. H. TENBROECK, EPHRAIM G. PALMER, HENRY S. AMBLER and IRA S. JOHNSON, named in the annexed petition:

Gentlemen.—The attorney-general of the State of New York has appointed the 2d day of March, 1888, at ten o'clock in the forenoon, as the time, and his office in the capitol, in the city of Albany, as the

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place where he will hear any cause you may have to show why the prayer of said petition should not be granted, and this notice is served on you by his direction.

Dated February 25, 1888.

CHARLES ROSBORO,
LORENZO J. GOODRICH,
WILLIAM V. REYNOLDS,
MYRON E. CLARK,
ALLEN C. FITCH.

To the Attorney-General of the State of New York.

The petition of Charles Rosboro, Lorenzo J. Goodrich, William V. Reynolds, Myron E. Clark and Allen C. Fitch respectfully shows, that the Columbia County Agricultural Society is a domestic corporation and was duly organized as such under chapter 425 of the Laws of the State of New York, passed April 13, 1855, and other laws of said State amendatory thereof or supplementary thereto; that on the 2d day of January, 1888, an election of officers of said society was duly held at Barton Hall in the village of Chatham, in said county, and that at said election the said Charles Rosboro received the greatest number of legal votes for the office of president of said society, and was duly elected to said office; the said Lorenzo J. Goodrich received the greatest number of legal votes for the office of vice-president of said society, and was duly elected to said office; the said William V. Reynolds received the greatest number of legal votes for the office of secretary of said society, and was duly elected to said office; the said Myron E. Clark received the greatest number of legal votes for the office of treasurer of said society, and was duly elected to said office; Isaac C. Washburn and said Allen C. Fitch received the greatest number of legal votes for the offices of directors of said society, and were duly elected to said offices; that John P. Mickle, on or about the 3d day of January, 1888, intruded into and largely usurped the office of president of said society, and has ever since, to a large extent, withheld the same from the said Charles Rosboro; that Isaac E. Bain, on or about the 3d day of January, 1888, intruded into and largely usurped the office of vice-president of said society, and has ever since, to a large extent, withheld the same from the said Lorenzo J. Goodrich; that Charles E. Halstead, on or about the 3d day of January, 1888, intruded into and largely usurped the office of secretary of said society, and has ever since, to a large extent, withheld the same from the said William V. Reynolds; that William H. Tenbroeck, on or about the 3d day of January, 1888, intruded into and largely usurped the office of treasurer of said society, and has ever since, to a large extent, withheld the same from the said Myron E. Clark; that Ephraim G. Palmer, Henry S. Ambler and Ira S. Johnson, on or about the 3d day of January, 1888, intruded into and largely usurped the offices of directors of said society, and have ever since, to a large extent, withheld the same from the said Allen C. Fitch.

Your petitioners, therefore, pray that your honor, on behalf of the State of New York, will bring an action in the Supreme Court against the said persons so intruding into and usurping said offices, for the

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purpose of obtaining the judgment of said court, ousting and excluding them therefrom, and in favor of your petitioners, and as part of said judgment also awarding that each of the said persons so intruding and usurping pay a fine not exceeding \$2,000.

And your petitioners will ever pray, etc.

Dated February 25, 1888.

(Add signatures and verification.)

Complaint.

SUPREME COURT — COUNTY OF ULSTER.

The People of the State of New York, on the
relation of Charles Rosboro, William V.
Reynolds, Myron E. Clark and Allen C.
Fitch, Plaintiffs,

agst.

John P. Mickle, Charles E. Halstead, Wil-
liam H. Tenbroeck, Ephraim G. Palmer
and Henry S. Ambler.

The plaintiffs, by Charles F. Tabor, the attorney-general of the State of New York, upon information and belief, complain and allege:

First. That the Columbia County Agricultural Society is a domestic corporation, and was duly organized as such under chapter 425 of the Laws of the State of New York, passed April 13, 1855, and other laws of said State amendatory thereof and supplementary thereto.

Second. That on the 2d day of January, 1888, an election of officers of said society was duly held at Barton Hall, in the village of Chatham, in the county of Columbia, and that at said election the said Charles Rosboro received the greatest number of legal votes for the office of president of said society, and was duly elected to said office; the said William V. Reynolds received the greatest number of legal votes for the office of secretary of said society, and was duly elected to said office; that said Myron E. Clark received the greatest number of legal votes for the office of treasurer of said society, and was duly elected to said office; Isaac C. Washburn and said Allen C. Fitch received the greatest number of legal votes for the office of directors of said society, and were duly elected to said offices, and this action is brought by the attorney-general of this State on the relation of the said Charles Rosboro, William V. Reynolds, Myron E. Clark and Allen C. Fitch; that the said John P. Mickle after said election, and on or about the 3d day of January, 1888, intruded into and unlawfully exercised within this State the office of president of said society, and has ever since continued so to do in violation of the said Charles Rosboro's rights; that the said Charles E. Halstead after said election, and on or about the 3d day of January, 1888, intruded into and unlawfully exercised within this State the office of secretary of said

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society, and has ever since continued so to do in violation of the rights of the said William V. Reynolds; that the said William H. Tenbroeck after said election, and on or about the 3d day of January, 1888, intruded into and unlawfully exercised the office of treasurer of said society, and has ever since continued so to do in violation of the rights of the said Myron E. Clark; that the said Ephraim G. Palmer and Henry S. Ambler after said election, and on or about the 3d day of January, 1888, intruded into and unlawfully exercised the office of director of said society and have ever since continued so to do in violation of the rights of the said Allen C. Fitch.

Wherefore the plaintiffs demand judgment that said defendants are not and neither is entitled to the office into which they respectively intruded, as aforesaid, and which they respectively exercised and yet exercise, as aforesaid, and that they be respectively ousted and excluded therefrom, and also award and adjudge the costs of this action against the defendants, and that each of them pay to the said people of the State of New York a fine of \$2,000; that the said Charles Rosboro, William V. Reynolds, Myron E. Clark and Allen C. Fitch is each entitled to and be put in possession of the said offices to which they were respectively elected as aforesaid.

CHARLES F. TABOR, Attorney-General,
Plaintiff's Attorney.

SUB. 2. INJUNCTION. § 1955.

§ 1955. [Am'd, 1896.] When injunction may be granted.

In an action, brought as prescribed in subdivision third or fourth of section nineteen hundred and forty-eight of this act, the final judgment, in favor of the plaintiff, must perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted, upon proof, by affidavit, that the defendant or defendants have violated any of the provisions of either of the said subdivisions third or fourth of section nineteen hundred and forty-eight of this act. The provisions of title second of chapter seventh of this act apply to such a temporary injunction, and the proceedings thereupon, except where provision is otherwise made in this title. For that purpose, the injunction order is deemed to have been granted as prescribed in section six hundred and three of this act. In the trial of an action brought as prescribed in subdivisions third or fourth of section nineteen hundred and forty-eight of this act, a party or a witness is not excused from answering a question on the ground that such answer will tend to incriminate him; but such answer cannot be used as evidence against the person so answering, in a criminal action or criminal proceeding.

The chancellor was empowered to restrain by injunction a corporation or individual from exercising any corporate rights not granted by law, by § 31, 2 R. S. 462. These provisions were re-incorporated in §§ 1948 and 1955 of the Code. *People v. Equity Gas Works Construction Co.* 52 St. Rep. 317, citing *People v. Ballard*, 134 N. Y. 269, note 276, 48 St. Rep. 166.

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In an action to try title to office an injunction *pendente lite* cannot be granted where the action is between individuals; *Morris v. Whelan*, 64 How. 109; but may be had in an action by the attorney-general. *Tappen v. Gray*, 9 Paige, 507; s. c. 7 Hill, 259; *The Mayor v. Conover*, 5 Abb. 171; *People v. Sampson*, 25 Barb. 254; *Hartt v. Harvey*, 32 Barb. 55. A defendant should not be restrained from exercising all his functions during the pendency of an action, though he may be restrained from specific acts. *People ex rel. v. Draper*, 24 Barb. 265. In an action in the name of the people, to remove a person from office in a corporation into which it is alleged he has intruded, and for damages, an injunction is not proper. *People ex rel. v. Conklin*, 5 Hun, 452. The Supreme Court has jurisdiction to restrain those claiming to be the trustees of a religious corporation in an action, brought by those in possession, from interfering with the property, etc., of the corporation. *Reis v. Rhode*, 6 Civ. Pro. R. 406.

If a mutual insurance company exercises franchises not conferred by its charter, or without complying with statutory conditions, it may be restrained by application to the court. *People v. Mutual Endowment, etc. Ass'n*, 17 Week. Dig. 174. As to injunction in *quo warranto* proceedings, see cases under § 1948.

SUB. 3. TRIAL BY JURY. § 1950.

§ 1950. Action triable by jury.

An action brought as prescribed in this article is triable, of course and of right, by a jury, in like manner as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.

An action in the nature of a *quo warranto*, brought by the attorney-general in the name of the people, to try the title to a corporate office to which there are several claimants, is one of legal, not of equitable, cognizance, and the issues therein are strictly legal ones. The trial of such issues, therefore, by a jury is the constitutional right of the parties, and if other equitable causes of action are united with such an action all must be tried by a jury, unless a jury trial is waived. Where plaintiff read the pleadings and then rested, and some of defendants applied for trial by jury, which was denied, *held* error; a party cannot be deprived of his constitutional privilege of trial by jury by a technicality. *People v. A. & S. R. R. Co.* 57 N. Y. 161. A special jury will not be ordered in *quo warranto* proceedings unless special reasons therefor are shown. *People v. Maguire*, 43 How. 67.

Art. 2. Proceedings in the Action.

SUB. 4. EVIDENCE.

In an action by the attorney-general in the name of the people, to try the title to an office, the defendant must show, before he can have judgment in his favor, that he has the legal title to the office. Possession is not, in such an action, evidence of his right. The burden is upon him of showing that his possession is a legal and rightful one. Where, however, the action is brought upon the relation of one claiming the office, the failure of the defendant to prove his title does not establish that of the relator. Upon that issue the plaintiffs have the affirmative, and the burden is upon them to maintain it. *People v. Thacher*, 55 N. Y. 525; *People ex rel. v. Utica Ins. Co.* 15 Johns. 357; *People v. Anthony*, 6 Hun, 142. The certificate of county canvassers gives presumption of title to the office, and absolute title to it is destroyed by evidence showing it does not state the true result. *People ex rel. v. Kessel*, 10 Week. Dig. 209. But the certificate and returns are open to inquiry, and may be corrected and set aside if shown to be erroneous. *People ex rel. v. Tail*, 20 Wend. 12; *People ex rel. v. Thatcher*, 55 N. Y. 525. A voter's intention in such a case is open to inquiry. *People v. Saxton*, 22 N. Y. 309; *People ex rel. v. Love*, 63 Barb. 535. A relator is bound to make out a better title than that of defendant; but as between the people and defendant, the latter may be called on to show his possession of the office lawful. *People ex rel. v. Perley*, 80 N. Y. 624. The legal qualifications of voters may be inquired into in proceedings in the nature of *quo warranto* to try the title to an elective office, and in case any were disqualified by want of residence, or being minors or aliens, their votes are to be discarded where it will change the result of the election. The declarations of the voter himself, though hearsay evidence of such disqualification, may be received to establish it. *People ex rel. v. Pease*, 27 N. Y. 45; *People v. Cook*, 8 N. Y. 67; *People v. Thacher*, 55 N. Y. 525; *People v. Seaman*, 5 Den. 409. And the record of appointment of an appointive office may be contradicted. *People v. McCausland*, 54 How. 151.

SUB. 5. COSTS AND APPEAL.

In an action, in the nature of a *quo warranto*, brought against a number of defendants, where the court has no power to adjust the ultimate rights of the defendants in the subject of the action,

Art. 2. Proceedings in the Action.

it cannot compel a part of the defendants to pay costs to the other defendants. *People ex rel. v. A. & S. R. R. Co.* 5 Lans. 25, affirmed on other grounds, 57 N. Y. 161. A proceeding in the nature of a *quo warranto* is a civil action, and the prevailing party is entitled to costs where the complaint in such action alleges that the defendant has usurped the office in question, and that the relator is entitled to it, and issue is joined on both questions. In case judgment is rendered against defendants ousting him from office, the people and the relator are plaintiffs, and, as such, are entitled to costs, although the judgment also determines that the relator is not entitled to the office. *People ex rel. Furman v. Clute*, 52 N. Y. 576. Although an office has expired when judgment comes to be pronounced, yet the court will proceed and pronounce judgment, inasmuch as the relators, if successful, are entitled to costs. *People v. Loomis*, 8 Wend. 396. The defeated party is liable for costs. *People v. Clarke*, 10 Barb. 120, affirmed, 9 N. Y. 349; *People ex rel. v. Cook*, 8 N. Y. 67. It seems that, for the purpose of collecting costs and a fine, an execution is proper. *People v. Conover*, 6 Abb. 220.

In an action in the nature of *quo warranto*, based upon the incapacity of defendant to hold the office, and the election of relator, as in case of a vacancy, the defendant is not interested after his incapacity is established, in defeating the relator's claim, and cannot appeal from a judgment establishing it, where his own incapacity stands admitted. *People ex rel. Cornell v. Knox*, 38 Hun, 236. Decisions are to be reviewed upon the principles applicable to civil actions. *People v. Cook*, 8 N. Y. 67. An appeal does not operate as a stay of proceedings. *Welch v. Cook*, 7 How. 282.

In an action brought by the attorney-general to oust the defendant from office of trustee of a village, the relief demanded was a judgment of ouster and restoration of the relator to office. No compensation or perquisites were attached to the office. On motion to dismiss an appeal to the Court of Appeals, it was held that as the matter in controversy was less than \$500, the case was not appealable. It seems that had it been made to appear the relator had suffered damage to the amount of \$500 by his exclusion from the office, the appeal would have been authorized. *People ex rel. Wright v. Willard*, 110 N. Y. 662.

Art. 3. Judgment and its Effect.

ARTICLE III.

JUDGMENT, AND ITS EFFECT. §§ 1951, 1952, 1953, 1956.

§ 1951. Assumption of office by person entitled.

Where final judgment is rendered, upon the right and in favor of the person so alleged to be entitled, he may, after taking the oath of office, and giving an official bond, as prescribed by law, take upon himself the execution of the office. He must, immediately thereafter, demand of the defendant in the action, delivery of all the books and papers in the custody, or under the control, of the defendant, belonging to the office from which the defendant has been so excluded.

§ 1952. Proceedings to obtain books and papers.

If the defendant refuses or neglects to deliver any of the books or papers, demanded as prescribed in the last section, he is guilty of a misdemeanor; and the same proceedings must be taken to compel the delivery thereof as are now or shall hereafter be prescribed by law, where a person who has held an office refuses or neglects to deliver the official books or papers to his successor.

§ 1953. [Am'd, 1884.] Damages; how recovered.

Where final judgment has been rendered, upon the right and in favor of the person so alleged to be entitled, he may recover, by action, against the defendant, the damages which he has sustained in consequence of the defendant's usurpation, intrusion into, unlawful holding, or exercise of the office.

§ 1956. Final judgment in action for usurping office, etc.

In any other action, brought as prescribed in this article, where a defendant is adjudged to be guilty of usurping or intruding into, or unlawfully holding or exercising an office, franchise or privilege, final judgment must be rendered, ousting and excluding him therefrom, and in favor of the people or the relator, as the case requires, for the costs of the action. As a part of the final judgment, the court may, in its discretion, also award, that the defendant, or, where there are two or more defendants, that one or more of them pay to the people a fine, not exceeding two thousand dollars. The judgment for the fine may be docketed, and execution may be issued thereupon, in favor of the people, as if it had been rendered in an action to recover the fine. The fine, when collected, must be paid into the treasury of the state.

Where under an adverse judgment in an action of *quo warranto*, the defendant, who was in possession of the office, having a certificate of election from the duly constituted board of canvassers, was removed from the office, *held*, that upon reversal of the judgment by the Court of Appeals, it was proper to compel restitution of the rights lost by the erroneous judgment on motion to amend the judgment by adding to it a command that the relator surrender to the defendant all the books, papers and insignia of office, and the rooms appropriated to the use of the officer. The provisions of the Revised Statutes to compel the delivery of books and papers by an officer to his successor, or by a usurper to a real

Art. 3. Judgment and its Effect.

officer, do not interfere with the action of the appellate court in such a case. The party having the adjudication in his favor required by statute, that is conclusive. *People ex rel. Dailey v. Livingston*, 80 N. Y. 66. Where there has been an adjudication that a person claiming an office is entitled thereto as against an incumbent, any amount of compensation for services rendered, not paid to the intruder in the office, is due and payable to the one entitled to the office, and may be recovered by the latter of the municipality; but where payment has once been made to the person in office under color of title, the municipality is protected from a second payment, after an adjudication against the one in office; and after notice thereof to the disbursing officer of the municipality, if the intruder continues to perform the duties of the office, the compensation belongs to the person adjudged entitled to the office, and he may maintain an action against the municipality therefor, although it has been paid to the intruder. *McVany v. The Mayor*, 80 N. Y. 185; *Dolan v. The Mayor*, 68 N. Y. 274. If, pending the proceedings, one not a party to the action gets possession of the office, claiming title, he is not affected by the judgment. *People v. Murray*, 73 N. Y. 535. Upon the rendition of a regular judgment of ouster against the officer and in favor of the claimant, the officer becomes vested, *eo instanti*, with the office. A writ of assistance or leave to issue execution should not be granted directing the sheriff to put the successful party in possession of the office and books and papers; so far as the office is concerned, the judgment executes itself. *People v. Conover*, 6 Abb. 220; *Welch v. Cook*, 7 How. 282.

The order for delivering of the books and papers will be made only when the title is clear. *People v. Stevens*, 5 Hill, 616; *Conover's Case*, 5 Abb. 73; *Matter of Baker*, 11 How. 418; *People v. Allen*, 42 Barb. 203; *Declin's Case*, 5 Abb. 281; *Matter of Whiting*, 2 Barb. 513; *Matter of Davis*, 19 How. 323. For a discussion of the practice on such an application, see *Welch v. Cook*, 7 How. 173, 7 How. 282. An appeal from the judgment of ouster does not operate as a stay of proceedings. *Welch v. Cook*, 7 How. 282.

Where one has unlawfully obtained possession of an office to which another is appointed, the latter may maintain an action against the former for the emoluments or salary attached to the office and received by the incumbent. *Nichols v. McLean*, 63

Art. 3. Judgment and its Effect.

How. 448. Section 1953 was amended in 1884, by reason of the litigation theretofore arising over the mayoralty of the city of Albany. In that case a verdict was rendered in favor of relator, that he was entitled to the office; thereafter, upon application of the relator, a supplemental complaint was allowed to be filed by plaintiff, by reason of defendant having drawn the salary of the office, on the ground that the claim for damages could not be set forth in the original complaint, but must be alleged in some manner after the right to the office had been established. *Swinburne v. Nolan*, 30 Hun, 484. The defendant filed an answer denying that the plaintiff had sustained damages to that amount, admitting the receipt of the salary, but denying that plaintiff was entitled thereto. On the trial the court held that there were no disputed questions of fact and directed a judgment for the amount named. *Held*, no error; that in case of the usurpation of a public office, the measure of damages is the amount of salary received by the usurper. *Swinburne v. Nolan*, 32 Hun, 512. The latter decision was affirmed, 101 N. Y. 539, which also holds, that taking the oath and a demand of possession of the office are not conditions precedent to the relator's right of recovery. It is not part of the plaintiff's case to show that the relator was prepared to enter upon the duties of the office, nor is it any defense that conditions precedent to their performance have not been observed by him.

The fine provided for under § 1956 is not a part of the cause of action or claim but a mere incident to success in the action, resting wholly in the discretion of the court, which if plaintiff succeeds would be imposed, whether alleged in the complaint or not. By demanding it plaintiff did not engraft upon the complaint any element of a pecuniary claim within the meaning of that term as used in the Code authorizing an extra allowance, which can only be granted on the basis of the value of the claim or subject, matter involved in the action and litigated directly, not incidentally. *People ex. rel. Winans v. Adams*, 128 N. Y. 129, 21 Civ. Pro. R. 159, reversing 13 Supp. 714, 37 St. Rep. 603, 20 Civ. Pro. R. 195.

It seems that a fine should not be imposed on incumbents ousted from office in a corporation, who held under a regularly issued certificate of election, the contest being as to the reception or exclusion of the fund. *St. Stephen Church cases*, 25 Abb. N. C. 253; *S. C. sub. nom. People v. Weeks*, 11 Supp. 671.

Art. 3. Judgment and its Effect.

A fine should not be imposed in *quo warranto* for usurping the office, unless there is some evidence showing that defendant has been guilty of a criminal, or at least grossly improper act, in taking or holding the office. *People ex rel. Swinburne v. Nolan*, 65 How. 468.

Form of Judgment.

SUPREME COURT.

The People of the State of New York, on the relation of Charles Rosboro, William V. Reynolds, Myron E. Clark and Allen C. Fitch, Plaintiffs

agst.

John P. Mickle, Charles E. Halstead, William H. Tenbroeck, Ephraim G. Palmer and Henry S. Ambler, Defendants.

The issues in this action having been brought on for trial before Mr. Justice Samuel Edwards and a jury, at a Circuit Court held on the second Tuesday of June, 1888, and a verdict for the plaintiff and relators against the defendants, and that the relators were severally duly elected to their respective offices, as alleged in the complaint, having been duly rendered on the 15th day of June, 1888, and the court having thereupon ordered that judgment be entered in pursuance of such verdict in favor of the plaintiffs upon the rights against the defendants upon the right, and upon the right in favor of the relators against the defendants upon the right, and as the several rights of the plaintiffs, respective relators and respective defendants are found and determined by the said verdict, and that such judgment also adjudge that the defendants were respectively guilty of intruding into and unlawfully exercising and continuing to exercise within this State the several offices as alleged in the complaint in this action, and that they respectively be ousted and excluded therefrom, and in favor of the relators against the defendants for the costs of this action, and that the defendants are not, and neither of them is, entitled to the office into which they respectively intruded as aforesaid, and which they respectively exercised, and yet exercise as aforesaid, and that the relators are each respectively entitled to be put in possession of said offices to which they were respectively elected as aforesaid, and the costs of the relators having been adjusted at \$370.74:

Now, on motion of Charles F. Tabor, attorney-general, by Andrews & Longley as counsel, to assist the attorney-general in the prosecution of the above cause in behalf of this State, judgment is hereby ordered given and rendered in favor of the plaintiffs upon the right, against the defendants upon the right, and upon the right in favor of the relators against the defendants upon the right, and as the

Art. 3. Judgment and its Effect.

several rights of the plaintiff's respective relators and respective defendants are found and determined by the said verdict, and that the defendants were respectively guilty of intruding into and unlawfully exercising and continuing to exercise within this State the several offices as alleged in the complaint in this action, and that the said defendant John P. Mickle be ousted and excluded from the office of president of the Columbia County Agricultural Society, mentioned in the complaint in this action, and that said Charles Rosboro, one of the relators in this action, is and he is hereby declared to be entitled to the said office of president of said society, by virtue of the election in said complaint contained; that the said defendant Charles E. Halstead be ousted and excluded from the office of secretary of the said Columbia County Agricultural Society, mentioned in the complaint in this action, and that the said William V. Reynolds, one of the relators in this action, is and he is hereby declared to be entitled to the said office of secretary of said society, by virtue of the election in the said complaint mentioned; that the said defendant William H. Tenbroeck be ousted and excluded from the office of treasurer of the said Columbia County Agricultural Society mentioned in the complaint in this action, and that the said Myron E. Clark, one of the relators in this action, is and he is hereby declared to be entitled to the said office of treasurer of said society, by virtue of the election in the said complaint contained; that the said defendants Ephraim G. Palmer and Henry S. Ambler be ousted and excluded from the office of directors of the said Columbia County Agricultural Society mentioned in the complaint in this action, and that the said Allen C. Fitch, one of the relators in this action, is and he is hereby declared to be entitled to the said office of director of said society, by virtue of the election in the said complaint mentioned; and also that the defendants in this action are not and neither of them is entitled to the office into which they respectively intruded as aforesaid, in which they respectively exercised and yet exercise as aforesaid, and that the relators are each respectively entitled to be put in possession of said offices to which they were respectively elected as aforesaid. And it is further adjudged that the said relators, the said Charles Rosboro, William V. Reynolds, Myron E. Clark and Allen C. Fitch, recover against the defendants the said John P. Mickle, Charles E. Halstead, William H. Tenbroeck, Ephraim G. Palmer and Henry S. Ambler, the sum of \$370.74 costs of this action.

Dated June 19, 1888.

JACOB D. WURTS,
Clerk of Ulster County.

CHAPTER XXXV.

MISCELLANEOUS ACTIONS ON BEHALF OF THE PEOPLE.

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ARTICLE I.

ACTION TO VACATE LETTERS-PATENT. §§ 1957-1960.

§ 1957. When attorney-general may maintain action.

The attorney-general may maintain an action to vacate or annul letters-patent, granted by the people of the State, in either of the following cases:

1. Where they were obtained by means of a fraudulent suggestion, or concealment of a material fact, made by, or with the knowledge or consent of, the person to whom they were issued.

2. Where they were issued in ignorance of a material fact, or through mistake.

3. Where the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions upon which the letters-patent were granted, or have, by any other means, forfeited the interest acquired under the same.

Whenever the attorney-general has good reason to believe that any act or omission, specified in this section, can be proved, and that the person to be made defendant has no sufficient legal defence, he must commence such an action.

§ 1958. Action triable by jury.

An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.

§ 1959. Copy of judgment-roll to be filed, etc.

Where final judgment, vacating or annulling letters-patent, is rendered in an action, brought as prescribed in the last section, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of State; who must make an entry in the records of the commissioners of the land office stating the substance and effect of the judgment, and the time when the judgment-roll was filed. The real property, granted by those letters-patent, may thereafter be disposed of by the commissioners of the land office, as if the letters-patent had not been issued.

Art. 2. Action for a Fine, Penalty or Forfeiture, or upon a Forfeited Recognizance.

§ 1960. Transcript to be sent to county clerk, etc.

Immediately after making the entry prescribed in the last section, the secretary of State must transmit a certified transcript thereof to the clerk, or the register, as the case requires, of each county, in which the real property affected by the judgment is situated. The clerk or register must file it; and, if the letters-patent are recorded in his office, he must note the contents of the transcript in the margin of the record.

See *People v. Clarke*, 9 N. Y. 349, as to when this action can be maintained. As this action can only be maintained by the attorney-general for the benefit of the State, and as the precedents are easily accessible by that office, none are given here.

ARTICLE II.

ACTION FOR A FINE, PENALTY OR FORFEITURE, OR UPON A FORFEITED RECOGNIZANCE. §§ 1961-1968.

§ 1961. [Am'd, 1895.] When action cannot be maintained.

Whenever, by the decision of the appellate division of the supreme court, a construction is given to a statute, an act done, in good faith, and in conformity to that construction, after the decision was made, and before a reversal thereof by the court of appeals, is so far valid, that the party doing it is not liable to any penalty or forfeiture, for an act that was adjudged lawful by the decision of the court below. But this section does not control or affect the decision of the court of appeals, upon an appeal actually taken before the reversal.

§ 1962. Action for forfeiture, etc.

Where real or personal property has been forfeited, or a penalty incurred, to the people of the state; or to an officer, for their use, pursuant to a provision of law, the attorney-general, or the district attorney of the county in which the action is triable, must bring an action to recover the property or penalty, in a court having jurisdiction thereof. Where the supreme court and a justice's court have concurrent jurisdiction of the action, it may be brought in either, at the election of the attorney-general or district attorney. A recovery in such an action bars a recovery, in any other action, brought for the same cause.

§ 1963. Money recovered; how disposed of.

Money recovered in such an action, which is not otherwise specially granted or appropriated by law, must, when collected, be paid into the treasury of the state.

§ 1964. Certain proceedings in the action regulated.

Sections 1897 and 1898 of this act apply to an action, brought as prescribed in the last two sections.

§ 1965. Recognizance; how forfeited.

Where the condition of a recognizance is broken, an order of the court, directing the prosecution of the recognizance, is a sufficient forfeiture thereof.

Art. 2. Action for a Fine, Penalty or Forfeiture, or upon a Forfeited Recognizance.

§ 1966. Action on recognizance.

Where a recognizance to the people is forfeited, the district attorney of the county in which it was taken, must, unless the court otherwise directs, forthwith bring an action to recover the penalty thereof. It is not necessary, in such an action, to allege or prove any damages, by reason of the breach of the condition; but where the people are entitled to judgment therein, they must have judgment absolute, for the penalty of the recognizance.

§ 1967. Money received by district attorney; how disposed of.

Within thirty days after a district attorney receives or collects money upon a recognizance, or for a penalty or forfeiture, belonging to the county, he must pay it to the county treasurer of his county, deducting only his necessary disbursements; except that, where he does not receive, as his compensation, a salary fixed pursuant to law, the county court may, by an order entered in its minutes, allow him to retain also a sum, specified in the order, for his reasonable costs and expenses, and a reasonable counsel fee.

§ 1968. District attorney to render account.

Each district attorney must render to the first term of the county court of his county, held in each calendar year, a written account, verified by his affidavit, of all actions brought by him upon recognizances, or for penalties or forfeitures belonging to the county, or to the state; of all his proceedings therein; of all judgments recovered by him therein; and of all money, collected by him from any person, belonging to the county or to the state. This section applies to a district attorney who has gone out of office, during the preceding calendar year.

The provision of the Revised Statutes for which section 1961 is substituted was held, in *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, not to apply to an action to recover damages sustained by the erection and maintenance of a bridge, as the action was not to enforce a penalty or forfeiture.

Section 1962 is confined to actions brought by the people. Actions by informers are provided for by §§ 1893, 1898.

The people have no capacity to sue for penalties except as authorized by law, and not then except through a person or officer authorized to bring the suit; it cannot be presumed that any officer authorizes an action in which his name does not appear and in which his authority to bring it is not claimed. *People v. Belknap*, 58 Hun, 241, 34 St. Rep. 239; same, *People v. Eckman*, 63 Hun, 209, 43 St. Rep. 457; *People v. Fish*, 125 N. Y. 143; *People v. Lamb*, 85 Hun, 171.

A party bound to appear and answer forfeits his recognizance if he departs without leave; *People v. Stager*, 10 Wend. 431; or if, after appearing, he depart without leave; *People v. Fayne*, 27 Barb. 58; or if called, he fail to appear at any time during the trial; *People v. Petry*, 2 Hilt. 523; *People v. Blankman*, 17 Wend.

Art. 2. Action for a Fine, Penalty or Forfeiture, or upon a Forfeited Recognizance.

252; or if he depart before the conclusion of the trial; *People v. McCoy*, 39 Barb. 73; or even if corporally present, he fail to answer when called; *People v. Wilgus*, 5 Den. 58. If a regular term of the court intervene at which no jury is summoned, there can be no forfeiture at a subsequent term. *People v. Derby*, 1 Park. 392. Where a recognizance is conditioned for the defendants appearance on a day certain, "and from time to time as directed by the justice," and the proceedings are adjourned at a time when the defendant is not present, there cannot be a forfeiture of the recognizance at a subsequent adjourned day. *People v. Scott*, 67 N. Y. 585. It is a valid excuse for non-appearance of the principal that he was enlisted as a soldier in the armies of the United States, and prevented from appearing by order of his superiors. *People v. Cook*, 30 How. 110; *People v. Cushuey*, 44 Barb. 118. The object of the statute is not simply to secure the attendance of the defendant at the adjourned day, but during the trial, until the termination thereof. *People v. Milham*, 100 N. Y. 273. In an action on a recognizance given by a husband for the support of his wife, it appeared that at the time it was given they were living apart; he then offered to support her at his father's house, where they had resided previously, but refused to support her elsewhere; she declined to go; *held*, the evidence failed to establish a breach of the recognizance. *People v. Pettit*, 74 N. Y. 320.

The Common Pleas has jurisdiction to remit a forfeited recognizance in whole or in part, upon such terms as appear just and reasonable. To entitle the bail to a remission of the forfeiture, it must appear that he in no way connived at the escape of the party indicted. *People ex rel. v. Petry*, 2 Hilt. 523.

An application to remit a forfeiture will not be entertained while the accused is a fugitive from justice. *People v. Fields*, 6 Daly, 410. Forfeiture will not be remitted on the ground of a verbal agreement by the district attorney to postpone the case or give notice. *People v. Haggerty*, 5 Daly, 232. And where a *nolle prosequi* has been entered, or the prisoner subsequently surrendered or acquitted, it must appear that the prosecution was not deprived of proofs by the delay. *People v. Carey*, 5 Daly, 533; s. c. 5 Daly, 406; *People v. Abrahams*, 6 Daly, 120; *People v. Williams*, 6 Daly, 69. If the principal dies, so that surrender cannot be made, judgment will be vacated; *People v. Wissig*, 7

Art. 2. Action for a Fine, Penalty or Forfeiture, or upon a Forfeited Recognizance.

Daly, 23; so if the principal surrenders and is convicted, but costs must be paid. *People v. Deery*, 6 Daly, 493. The recognizance will not be discharged on giving new bail till there has been a trial, but proceedings on the forfeiture will be stayed. *People v. Coman*, 5 Daly, 527, appeal dismissed, 63 N. Y. 611.

No one but the district attorney can prosecute for a breach of a recognizance given for good behavior. *People v. Myers*, 1 Sheld. 429. An action will lie in the Supreme Court on a recognizance taken in the Oyer and Terminer. *People v. Van Eps*, 4 Wend. 387. An action on a recognizance may be brought in any court having jurisdiction of the parties. *People v. Allen*, 2 How. 34; *People v. Blackman*, 1 Den. 632. It need not be averred that the recognizance was filed; *People v. Huggins*, 10 Wend. 464; but it must have been filed, in fact. *People v. Shaver*, 4 Park. 45. In an action on a recognizance given for the support of a bastard, it is not necessary to assign breaches. *People v. Corbett*, 8 Wend. 520; *People v. Tilton*, 13 Wend. 597. In a declaration on a recognizance for appearance, it is not necessary to show that there was a probable cause for believing the accused guilty of the charge preferred, nor that the magistrate made any adjudication in the matter. *Champlain v. People*, 2 N. Y. 82, overruling *People v. Young*, 7 Hill, 440; *People v. Koerber*, 7 Hill, 43. It is a good defence to an action on a recognizance that the arrest of the principal was illegal. *People v. Shaver*, 4 Park. 45. The inability of the principal to appear, by reason of the act of God, is a good defence to an action against the bail. *People v. Tubbs*, 37 N. Y. 586. In an action on a recognizance given by the putative father of a bastard, the verdict and judgment are for the penalty. *People v. Relyea*, 16 Johns. 155; *People v. Tilton*, 13 Wend. 597. As to the effect of the law of 1844 in making a docketed recognizance a lien on real estate as if a judgment, see *People v. Lott*, 21 Barb. 130. A recognizance, wherein it is agreed that, on default, a summary judgment may be entered, is constitutional, and a judgment may be entered by filing the recognizance with the county clerk, with a copy of the order declaring it forfeited. *People v. Quigg*, 59 N. Y. 83.

 Art. 3. Actions Founded upon the Spoliation of Public Property.

ARTICLE III.

ACTIONS FOUNDED UPON THE SPOILIATION OR OTHER MISAPPROPRIATION OF PUBLIC PROPERTY. §§ 1969-1976.

§ 1969. Action in court of the state for public funds illegally obtained, converted, etc.

Where any money, funds, credits, or other property, held or owned by the state, or held or owned, officially or otherwise, for or in behalf of a governmental or other public interest, by a domestic municipal, or other public corporation, or by a board, officer, custodian, agency, or agent of the state, or of a city, county, town, village or other division, subdivision, department, or portion of the state, has heretofore been, or is hereafter, without right obtained, received, converted, or disposed of, an action to recover the same, or to recover damages, or other compensation, for so obtaining, receiving, paying, converting, or disposing of the same, or both, may be maintained by the people of the state, in any court of the state having jurisdiction thereof, although a right of action for the same cause exists by law in some other public authority, and whether an action therefor, in favor of the latter, is or is not pending, when the action in favor of the people is commenced.

§ 1970. Stay of other domestic actions; parties thereto to be brought in.

Where an action is commenced by the people, for a cause specified in the last section, the court in which it is brought may, upon the application of any party thereto, grant an order staying proceedings in any other action, brought, for the same cause, in the same or any other court of the state, by a public authority, other than the people; and, if necessary or proper, it may vacate any order or interlocutory judgment, made or rendered in such an action; and it may, by the same order, or by a subsequent order, granted upon the application of any party to either action, direct that any party to the action so stayed, be brought in, as a party to the action commenced by the people.

§ 1971. Actions, etc., in foreign courts.

The people of the state may commence and maintain, in their own name, or otherwise, as is allowable, one or more actions, suits, or other judicial proceedings, in any court, or before any tribunal of the United States, or of any other state, or of any territory of the United States, or of any foreign country, for any cause specified in the last section but one.

§ 1972. Money damages, etc., vest in people, on commencement of action.

Upon the commencement by the people of the state, of any action, suit, or other judicial proceeding, as prescribed in this article, the entire cause of action, including the title to the money, funds, credits, or other property, with respect to which the suit or action is brought, and to the damages or other compensation, recoverable for the obtaining, receipt, payment, conversion, or disposition thereof, is not previously so vested, is transferred to and becomes absolutely vested in, the people of the state.

§ 1973. Limitation of action.

The people of the state will not sue for a cause of action, specified in this article, unless it accrued within ten years before the action is commenced.

 Art. 3. Actions Founded upon the Spoliation of Public Property.

§ 1974. Ultimate disposition of proceeds of action in court of the state.

Any court of the state, in which an action is brought by the people, as prescribed in this article, may, by the final judgment therein, or by a subsequent order, direct that any money, funds, damages, credits, or other property, recovered by, or awarded to, the plaintiff therein, which, if that action had not been brought, would not have vested in the people, be disposed of, as justice requires, in such a manner as to reinstate the lawful custody thereof, or to apply the same, or the proceeds thereof, to the objects and purposes for which they were authorized to be raised or procured; after paying into the state treasury, out of the proceeds of the recovery, all expenses incurred by the people in the action.

§ 1975. Id.; upon petition of corporation, etc., aggrieved.

Any corporation, board, officer, custodian, agency, or agent, may, in behalf of any city, county, town, village, or other division, subdivision, department, or portion of the state, which was not a party to an action, brought as prescribed in this article, and which claims to be entitled to the custody or disposition of any of the money, funds, damages, credits, or other property, recovered by, or awarded to the plaintiff, by the final judgment in the action, or any of the proceeds thereof, and not disposed of as prescribed in the last section, present, at any time after the actual collection of the money, and its payment into the state treasury, or the actual receipt of the property by the people, to the supreme court, at a special term thereof held in the county of Albany, a verified petition, setting forth the facts, and praying for the relief to which he or it is entitled. Notice of the application and a copy of the petition must be served upon the attorney-general. Upon the hearing the court may make such a final order, as justice requires, for the disposition of the money or other property, as prescribed in the last section.

§ 1976. Attorney-general must bring action.

The attorney-general must commence an action, suit, or other judicial proceeding as prescribed in this article, whenever he deems it for the interests of the people of the state so to do; or whenever he is so directed, in writing, by the governor.

It is said by the revisers that this article of the Code consists exclusively of a revision of chapter 49 of the Laws of 1875, passed as is well known, with special reference to the actions to recover for the spoliation of public property by dishonest officials of the city and county of New York. The constitutionality of the statute was affirmed in *People v. Tweed*, 63 N. Y. 202. No precedents are given, as the action is necessarily one rarely brought, and the files of the State library are readily accessible for examination of the pleadings and record in the *Tweed Case*, which will serve as an appropriate precedent in this class of cases. An action to recover real property was held not within the purview of the act for which this article is substituted. The word "property," associated with the preceding words of specific description in the act,

Art. 4. Action to Recover Property Escheated or Forfeited.

is to be construed as referring to property of the same general character. The act was not intended to confer jurisdiction to review, by means of an action, as therein prescribed, the proceedings of a town meeting, or to set them aside upon the ground that their action was produced by corruption, intimidation or violence. An action by the people is not maintainable under the act to recover lands of a town, the title to which, it was alleged, had been wrongfully acquired, through the wrongful interference of its servants or agents with the action of a town meeting, they procuring the passage of a vote authorizing the conveyance of lands for a grossly inadequate sum, by the action of the persons not legal or qualified voters. *People v. N. Y. etc. R. R. Co.* 84 N. Y. 565.

The provisions of § 1969 do not create new causes of action and do not take away those existing in favor of counties or municipalities, unless the State manifests its intention to enforce them by action. They simply authorize the State authorities to intervene and to enforce causes of action against offending parties which have accrued to certain subordinate political divisions of the State. An action so brought by the people is to be determined by the same principle as would determine the same action brought by a municipality. *People of the State of New York v. Wood*, 121 N. Y. 522, 31 St. Rep. 860. It was further held in this case that a compulsory reference was proper, reversing 54 Hun, 438.

ARTICLE IV.

ACTION TO RECOVER PROPERTY ESCHATEAD OR FORFEITED.

§§ 1977-1982.

§ 1977. Attorney-general to bring ejectment for real property, escheated or forfeited.

Whenever the attorney-general has good reason to believe, that the title to, or right of possession of, any real property, has vested in the people of the State, by escheat, or by conviction or outlawry for treason, he must commence an action of ejectment, to recover the property.

§ 1978. Notice to be published before trial or judgment.

The attorney-general must cause a notice, specifying the names of the parties, and the object of the action, and containing a brief description of the property affected thereby, to be published in the newspaper printed at Albany, in which legal notices are required to be published, in a newspaper published in the city of New York, and in a newspaper published in each county in which any part of

 Art. 4. Action to Recover Property Escheated or Forfeited.

the property is situated, at least once in each week, for twelve successive weeks, before an issue of fact, joined in the action, is brought to trial; or where judgment is rendered therein in favor of the plaintiff, otherwise than upon the trial of an issue of fact, before final judgment is rendered.

§ 1979. When unknown claimants may be made defendants.

If the property is not occupied, and no person is known to the attorney-general as claiming title thereto, the defendant or defendants may be designated as "unknown claimants," without any other description. In all other respects, section 451 of this act applies to an action, in which the defendant or defendants are thus designated.

§ 1980. Effect of judgment against unknown claimants.

Where, in an action of ejectment, to recover property alleged to be escheated, brought as prescribed in the last section, final judgment in favor of the people is rendered against unknown claimants, and the real property recovered thereby is afterwards sold and conveyed, under the direction of the commissioners of the land office, the judgment is conclusive upon the title of that property, as against all persons, except those who commence an action of ejectment for the recovery thereof, or of a part thereof, within five years after the final judgment was rendered in the action in favor of the people, and the judgment-roll was filed thereupon. But section 375 of this act applies to such an action.

§ 1981. Attorney-general to report recoveries to commissioners of land office.

The attorney-general must, from time to time, make a report to the commissioners of the land office, of all the real property recovered by the people, in any action brought pursuant to this article.

§ 1982. Action to recover personal property forfeited for treason.

Where personal property is forfeited to the people, upon a conviction of outlawry for treason, the attorney-general must bring, and may maintain, an action to recover the same, or the value thereof, or such other action, founded upon the forfeiture, as might be maintained by a private person, who had acquired title to the property.

Where land escheats, by reason of alienage of heirs of a purchaser, no proceedings are necessary to vest the title in the people of the State, and the State may grant them though alien heirs holds adversely. *Ettenheimer v. Hefferman*, 66 Barb. 374.

It may be well doubted whether an escheat of land can be enforced or established by any one but the State through the attorney-general in the mode prescribed in statutes carefully framed to protect the rights of heirs at the time unknown or undisclosed. *Croner v. Cowdrey*, 139 N. Y. 471, 54 St. Rep. 728.

The provision of § 1977 is for the enforcement of § 1 of chapter 1, of title 1, article 1, page 2 of the Revised Statutes, relative to escheated lands. *Folnston v. Spicer*, 107 N. Y. 185.

Art. 5. Miscellaneous Provisions Relating to Actions on Behalf of the People.

ARTICLE V.

MISCELLANEOUS PROVISIONS RELATING TO ACTION ON BEHALF OF THE PEOPLE. §§ 1983-1990.

§ 1983. Scire facias, quo warranto, etc., abolished.

The writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, have been abolished. The relief formerly obtained by means of either of those writs, may be obtained by action, where an appropriate action therefor is prescribed in this act.

§ 1984. Actions to be brought in the name of the people.

An action, brought as prescribed in this title, except an action to recover a penalty or forfeiture, expressly given by law to a particular officer, must be brought in the name of the people of the state; and the proceedings therein are the same, as in an action by a private person, except as otherwise specially prescribed in this title.

§ 1985. Judgment for costs may be taken against the people.

Where judgment is rendered or a final order is made, against the people, in a civil action brought, or special proceeding instituted, in their name, by a public officer, pursuant to a provision of law, it must be to the same effect, and in the same form, as against a private individual, who brings a like action, or institutes a like special proceeding, except as otherwise specially prescribed by law. But an execution shall not be issued against the people.

§ 1986. Relator; when to be joined as plaintiff; compensation of attorney-general.

Where an action is brought by the attorney-general, as prescribed in this title, on the relation or information of a person, having an interest in the question, the complaint must allege, and the title of the action must show, that the action is brought upon the relation of that person. In such a case, the attorney-general must, as a condition of bringing the action, require the relator to give satisfactory security to indemnify the people, against the costs and expenses thereof. Where security is so given, the attorney-general is entitled to compensation for his services, to be paid by the relator, in like manner as the attorney and counsel for a private person.

§ 1987. Costs; how collected against corporation and usurpers of franchise.

Where final judgment in an action, brought as prescribed in this title, is rendered against a corporation, or person claiming to be a corporation, the court may direct the costs to be collected by execution against any of the persons claiming to be a corporation; or by warrant of attachment, or other process, against the person of any director or other officer of the corporation.

§ 1988. Joinder of causes of action against same person.

Where two or more causes of action exist, in favor of the people, against the same person, for money due upon, or damages for the non-performance of, one or more contracts of the same nature, the attorney-general must join all those causes in one action.

Art. 5. Miscellaneous Provisions Relating to Actions on Behalf of the People.

§ 1989. Consolidation of actions against several defendants.

Where two or more actions brought in behalf of the people, upon the same mortgage or other contract, are pending against separate defendants, claiming or defending under the same title, the attorney-general must, upon the request of the defendants, cause them to be consolidated into one action; and only one bill of costs can be taxed against the defendants.

§ 1990. [Am'd, 1394.] When people, municipal corporation, etc., not required to give security.

Each provision of this act, requiring a party to give security, for the purpose of procuring an order of arrest, an injunction order, or a warrant of attachment, or as a condition of obtaining any other relief, or taking any proceeding; or allowing the court, or a judge, to require such security to be given, is to be construed as excluding an action brought by the people of the state, or by a domestic municipal corporation; or by a public officer, in behalf of the people, or of such a corporation; except where the security, to be given in such an action, is specially regulated by the provision in question; but in any action in which a domestic municipal corporation, or a public officer in behalf of such corporation, shall be, by the foregoing provisions of this section, excused from giving security on procuring an order of arrest, an order of injunction or a warrant of attachment, such corporation shall be liable for all damages that may be so sustained by the opposite party by reason of such order of arrest, attachment or injunction in the same case and to the same extent as sureties to an undertaking would have been, if such an undertaking had been given.

Section 1983 is referred to in opinion of Mayham, J., in *People v. Broadway R. R. Co. of Brooklyn*, 26 Abb. N. C. 420.

The provision allowing the attorney-general compensation from the relator is unconstitutional. *People v. Mutual Union Tel. Co.* 2 McCarty, 295. See *People v. Cohocton Stone Co.* 25 Hun, 13.

A court of equity has no inherent power to try a disputed title to corporate office and to enjoin one in possession from the exercise of its functions at the suit of a rival claimant. This may be done and judgment of ouster rendered only in an action in the nature of a *quo warranto* instituted by the attorney-general on behalf of and in the name of the people. *Ciancimino v. Man*, 48 St. Rep. 697, citing *Morris v. Whelan*, 64 How. 109; *Hudson River, etc. Co. v. Hay*, 14 Abb. Pr. (N. S.) 191; s. c. 1 Misc. 121.

An action to annul a corporation under article 4 of the Code, is purely a people's action and proceeds upon public grounds, and it cannot be said, within the meaning of § 1986, that any person who instigates such an action or applies to the attorney-general to have it commenced, has any interest in the questions involved in the action. *The People v. Buffalo Stone and Cement Co.* 42 St. Rep. 753, 131 N. Y. 140.

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No attempt is made at alphabetical arrangement in giving the references to pages under the subjects, as it tends rather to confuse than to assist, and therefore each topic should be followed in the index until the desired point is found.

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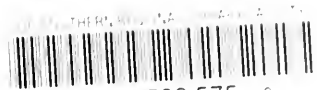
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